S. HRG. 98-191

REAUTHORIZATION OF EQUAL ACCESS TO JUSTICE ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON
ADMINISTRATIVE PRACTICE AND PROCEDURE

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

FIRST SESSION

ON

OVERSIGHT HEARING TO EXTEND THE AUTHORIZATION OF THE EQUAL ACCESS TO JUSTICE ACT, S. 919

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REAUTHORIZATION OF EQUAL ACCESS TO JUSTICE ACT

THURSDAY, APRIL 14, 1983

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE
PRACTICE AND PROCEDURE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 2:16 p.m., in room 226, Dirksen Senate Office Building, Hon. Charles E. Grassley (chairman of the subcommittee) presiding.

Present: Senators Baucus and DeConcini.

Staff present: John Maxwell, chief counsel and staff director; Ally Milder, counsel; and Susan Shirk, chief clerk.

OPENING STATEMENT OF SENATOR CHARLES E. GRASSLEY

Senator GRASSLEY. The subcommittee will come to order.

Today's hearing of the Subcommittee on Administrative Practice and Procedure has been called to review legislation to extend the authorization of the Equal Access to Justice Act. That act, which is Public Law 96-481, authorizes the award of attorneys fees to prevailing litigants where the Government cannot show its actions were substantially justified.

First conceived by Senator DeConcini in 1978 and introduced as S. 1101 in the 95th Congress, the popular bill had a difficult path to enactment. The Senate voted overwhelmingly in favor of the Equal Access to Justice Act on five separate occasions before the House finally acted on the proposal in the closing hours of the post-election session of the 96th Congress.

The timing of the House action is important to note. Because of the limited hours remaining in that session, the Senate was unable to react to House changes in the Senate bill and still have hope of seeing the bill become public law.

Therefore, the act, as it is now law, does not reflect a compromise between the two Houses, but, rather, a reluctant Senate's acceptance of House changes. One of those changes, the imposition of an expiration date of September 30, 1984, or a sunset provision, as opposed to the permanent character of the Senate bill, brings about the need for today's hearing.

We will, today, be addressing several points: First, should the act be reauthorized, or should it be allowed to expire? If reauthorized, are there areas of confusion, misapplication or omission in the act that need congressional clarification, either through amendment to the act, or through expression of congressional intent? Finally, S.

265, the bill which became this law, was not conferenced. Are there other changes that the House made in the Senate bill which the Senate would prefer returning to its original language?

In an effort to aid the Senate in consideration of this final point, the bill before us today, S. 919, sponsored by Senator Domenici, and cosponsored by Senator DeConcini and myself, was drafted by Senator Domenici in a manner to return the language of the law to the original Senate passed version. I hope that this will serve as a vehicle to aid us in focusing upon these issues; but other than the provisions for permanent reauthorization, it should in no way be construed as anything other than that in terms of my position on the substantive changes in the act.

I want to point, for example, to the provisions of S. 919 relating to the treatment of attorneys fees in tax cases. I have long been active, along with another member of the subcommittee, and also a comember of mine of the Senate Finance Committee, Senator Baucus, in the fight to insure that under certain circumstances attorneys fees are available to prevailing taxpayers in adjudication within the Department of the Treasury.

[Senate bill 919 follows:]

[S. 919, 98th Cong., 1st sess.]

A BILL To amend the Equal Access to Justice Act, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 504 of title 5, United States Code, is amended—

(1) by striking clause (i) from subsection (b)(1)(B) and inserting in lieu thereof the following: "(i) any individual whose net worth exceeding $1,000,000 at the time the adversary adjudication was initiated, and any owner of an unincorporated business, or any partnership, corporation, association, or organization whose net worth exceeded $5,000,000 at the time the adversary adjudication was initiated; except that a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)) may be a party regardless of the net worth of such cooperative association, and";

(2) by striking subsection (d)(1) and inserting in lieu thereof, "Fees and other expenses awarded under this subsection shall be paid by any agency over which the party prevails from any funds made available to the agency, by appropriation or otherwise, except that no sums may be appropriated to any such agency specifically for the purpose of paying fees and other expenses under this section. The court shall specify the agency or agencies that shall be responsible for payments of the awards."; and

(3) by striking out paragraph (2) of subsection (d).

SEC. 2. Section 2412 of title 28, United States Code, is amended—

(1) by striking from subsection (a) and (b) "or any agency and any official of the United States" each place it appears and inserting in lieu thereof "or any agency or any official of the United States";

(2) by striking out all of subparagraph (B) of subsection (d)(2) after the word "filed," in clause (i) and inserting in lieu thereof the following: "or (ii) any owner of an incorporated business or any partnership, corporation, association, or organization whose net worth did not exceed $5,000,000 at the time the civil action was filed, but 'party' does not include any owner of an unincorporated business, or a partnership, corporation, association, or organization having more than five hundred employees at the time the civil action was filed; except that a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)) may be a party regardless of the net worth of such cooperative association; and";

(3) by striking out all of subparagraph (A) of subsection (d)(4) and inserting the following:

"(4)(A) Fees and other expenses awarded under this subsection shall be paid by any agency over which the party prevails from any funds made available to the agency, by appropriation or otherwise, except that no sums may be appropriated to any such agency specifically for the purpose of paying fees and other expenses

under this section. The court shall specify the agency or agencies that shall be responsible for payment of the awards."; and

(4) by striking out section (c)(4)(B).

SEC. 3. Section 203(c) of the Equal Access to Justice Act (Public Law 96-481) is repealed.

SEC. 4. Section 204(c) of the Equal Access to Justice Act is repealed.

SEC. 5. Section 207 of the Equal Access to Justice Act, is repealed.

SEC. 6. Effective March 1, 1983, section 7430 of the Internal Revenue Code of 1954, as added by subsection (a) of section 292 of the Tax Equity and Fiscal Responsibility Act of 1982, is repealed.

Senator GRASSLEY. I was hopeful that in the wake of the Tax Court decision of 1982 denying applicability of the Equal Access to Justice Act to cases in the Tax Court, that the provisions of the 1982 Tax Equity and Fiscal Responsibility Act relating to attorneys fees would provide that meaningful remedy.

Since the enactment of TEFRA, however, there have been questions raised as to whether the TEFRA attorneys fees provision will provide the adequacy of remedy that Congress intended. I point, for example, to the testimony I received as chairman of the Subcommittee on Agency Administration during an oversight hearing that I held on December 9, 1982, reviewing the first year of the implementation of the Equal Access to Justice Act.

Let there be no mistake that this subcommittee will take no action to weaken the position of taxpayers in recovering attorneys fees from the Federal Government. We will, instead, be reviewing ways in which to strengthen the citizens position. In addition to reviewing the impact of TEFRA provisions upon the Equal Access to Justice Act, we will consider the equally important questions of what, if any, modifications to the act are necessary or desirable in, among others, the areas of definitions, coverage, financial disclosure, methods of payment, and technical modifications.

I will appreciate the witnesses being candid and forthright in their views, as well as honoring our request that oral testimony be summarized in the 5-minute presentation.

Before we hear from our witnesses, I want to take the opportunity at this point to enter into the record a statement by Senator Howell Heflin, the ranking minority member of this subcommittee, in which he indicates his cosponsorship of the bill. I would also like to enter into the record a statement by Senator Domenici in support of the legislation as he may be unable to join us at this hearing. Additionally, I would like to enter into the record at this point a statement by Senator Jim Sasser.

[Statements of Senators Heflin, Domenici, and Sasser follow:]

PREPARED STATEMENT OF SENATOR HOWELL HEFLIN

Mr. Chairman: Today the Subcommittee on Administrative Practice and Procedure will consider Senate Bill 919 to reauthorize the Equal Access to Justice Act.

I would like to commend Chairman Grassley for his leadership, diligent work, and continued interest in this legislative effort.

The Equal Access to Justice Act, which was passed by the 96th Congress, provides that if an individual or small businessman litigates against the Federal Government at either the administrative or judicial level and prevails, and the Government cannot substantially justify its pursuing the litigation, then the individual may recoup his legal costs.

The purpose of that Act was to make Government agencies more responsible for their actions and to give those individuals of modest means access to the judicial process when they have been injured by arbitrary Government action.

I supported the Equal Access to Justice Act when it passed the Senate in the 96th Congress and I continue to be interested in and supportive of this concept. As a former Chief Justice of the Supreme Court of Alabama, I fervently believe that everyone is entitled to his or her day in court. I believe that this concept of judicial access to government agencies for their capricious actions is especially important in light of the awesome impact that government regulations have on almost every aspect of our lives.

When the Equal Access to Justice Act was being considered by the Senate, there were predictions that the costs of this legislation would be enormous. Since it became effective on October 1 1981, the costs appear to be only approximately $1 million dollars.

Today, the Subcommittee will consider the reauthorization of this Act.

I look forward to working with Senator Grassley and my colleagues on this subcommittee as we take up this legislation.

I would like to welcome our distinguished witnesses here today and I look forward to receiving your testimony.

PREPARED STATEMENT OF SENATOR PETE V. DOMENICI

Mr. Chairman, this marks, if I recall correctly, the nineteenth time I have testified on behalf of the Equal Access to Justice Act. I sincerely hope Senator, this will have to be one of the last.

The bill we recently introduced is essentially the same as the version passed five times by the Senate in the 96th Congress. The purpose of that bill was, as an exception to the American Rule, that when a small business or individual prevailed in litigation, either administrative or judicial against the federal government and the government could not substantially justify its initiating the action, that individual was the entitled to attorney's fees and expenses.

The underlying purpose was that in an era of regulatory excess, the federal government was arbitrarily and capriciously forcing its citizens to knuckle under to federal dictates because of the inherent advantage to the government procedurally and in assets, such as lawyers and experts. Our notion was to invigorate the American spirit of fighting for individual rights. Before this Act was passed our citizens felt they could not adversarily defend their rights against their government because even if they won the cost was prohibitive.

What we did, Mr. Chairman, was to say, now, you can fight "City Hall" because if you win it won't cost you to fight. If you win the cost will come from the agency which initiated the proceedings. The government is then faced with the same cost benefit analysis as any other citizen.

During the passage of this bill by the Senate and its enactment by the Congress, compromises were forced upon us by the House. After two years, experience has led me to the following conclusions.

First, it is essential to insure prompt payment to those who are awarded judgements against the government. This can only be done by insisting that the initiating agency pay the awards from its existing appropriated funds. This will insure the payment is tendered within 45 days under the Prompt Payments Acts, but more importantly, I believe, will serve as an inducement to settle cases as quickly and reasonably as possible.

Secondly, the courts have failed to recognize the Congressional intent of postulating the "substantially justify" test for the government. This does not mean the burden is on the citizen to show the government to be vexatious, frivolous or unreasonable. The burden is to be on the government and it has more than the reasonable man test. Some courts have ignored this provision and engaged in what may be cited as judicial legislation. I don't know how we, the Congress, can make this test any clearer. Previous testimony from representatives of the Court states that Federal judges should have no difficulty in making this distinction. Obviously there has been a problem and I hope this will be corrected.

Last year the Congress passed a tax bill which contained a provision which set different standards for Equal Access when litigation was before the tax courts. It set conditions and criteria for Equal Access in terms of exceptions. I believe that the Senate's original intention was to include IRS in federal courts as all other Federal agencies with the same standards and tests.

Mr. Chairman, I know this Committee will consider other changes such as specifically including the Board of Contract Appeals under the auspices of P.L. 96-481. I support the changes the committee feels necessary.

In conclusion, I thank the committee for moving to make the Equal Access to Justice Act a permanent law. Its value is that it insures that the individual citizen will no longer be intimidated by the Administrative law process of our country.

PREPARED STATEMENT OF SENATOR JIM SASSER

Mr. Chairman, I am grateful for the opportunity to address this subcommittee today on a matter of great importance to the small business community. I applaud your action in generating further discussion on the Equal Access to Justice Act (EAJA) and hope that you will take this opportunity to consider expanding coverage of this significant measure to include appearances before Contract Appeals Boards.

I will not go into great detail on the history of the Equal Access to Justice Act, Mr. Chairman, as it is a subject I know that you are well versed in. I do however, want to address the basic policy behind that legislation and how that law is presently interpreted. At the outset, let me state that to the best of my knowledge there is no one who supports the present policy of preventing awarding attorney fees for appeals to Contract Appeals Boards. Even those who support the law don't think it represents good policy. Indeed, the Justice Department has not even addressed this issue in its testimony before the committee today.

The reluctance to embrace such a policy is understandable. The stated objective of the EAJA was to remove the disincentive to litigate facing many small businesses created by the high cost of litigation. The EAJA reflects our concern that individuals or small business owners facing unfair government action would accept inequitable out-of-court settlements in lieu of litigating the issues involved simply because they could not afford litigation expenses. The present interpretation of the EAJA in regard to contract appeals boards serves to perpetuate this disincentive to litigate and in so doing flies in the face of the Act's underlying purpose.

As you know Mr. Chairman, when we enacted the EAJA, many of us believed we had erased this deterrence to litigate. The EAJA set up a fair and just method of compensating private sector litigants. The bill did not create a windfall situation which could have led to numerous unwarranted cases being tried, but rather took a responsible course in determining when attorney fees could be awarded.

However, since enactment of that measure there has been continued confusion over the limits of its application. Specifically, there has been uncertainty in both the business community and among the various agencies over whether the provisions of the EAJA applied to hearings before contract appeals boards. The situation deteriorated to the point that small business owners would often find themselves in the anomalous position of one contract appeals board granting attorney fees while another would declare that it had no power to award such fees.

Recently, in the case of *Fidelity Construction Co.* v. *The United States*, the United States Court of Appeals for the Federal Circuit held that the provisions of the Equal Access to Justice Act do not apply to proceedings before contract appeals boards. Relying on the doctrine of sovereign immunity the court declared that specific language allowing such coverage under the Act would be necessary before the court could approve awarding attorney fees in such cases.

Mr. Chairman, I do not take exception with the judicial basis for the court's opinion. It is sound in all respects. I do feel the *Fidelity* opinion creates an intolerable and unjust situation. The ability to have one's day in court should not be denied our nation's small businesses simply because they are appearing before a contract appeals board.

Because of my concern over the inequity created by the *Fidelity* ruling, I introduced S. 1029, which amends the Equal Access to Justice Act to include appeals to contract appeals boards. I was joined in this effort by Senators Baucus and Dixon who share my concern over the chilling effect the *Fidelity* opinion may have on our small business.

S. 1029 provides the type of specific language the *Fidelity* court suggested would be necessary to extend coverage under the EAJA to contract appeals boards. My colleagues and I have attempted to speak with a strong, clear voice on this matter so there is no doubt as to our objective. We want small businesses to be able to have their disputes with the government decided on the merits of each specific case. We do not want to perpetuate a system in which individuals give in on an issue simply because they fear they can't afford to contest the case.

Mr. Chairman, I don't want to be misunderstood on this point. We are in no means seeking to do away with pre-trial settlements. As a trial attorney myself, I realize the importance of such settlements in our judicial system. I also realize such a system can be misused if one party is bargaining from a position of weakness. The

inability to litigate fostered by a fear of high attorney costs places small businesses in such a weakened position. The EAJA did much to restore balance to the negotiations between individual litigants and the federal government. S. 1029 continues this balancing process.

As I indicated at the opening of my statement, Mr. Chairman, I am unaware of anybody who feels that the present interpretation of law is good policy. I do know that the small business community and the legal community, including the American Bar Association, feel the law should be changed to comport with the language of S. 1029. It is my hope that your subcommittee will consider S. 1029 in your discussions of the Equal Access to Justice Act and report favorably on this measure. I again thank you for the opportunity to address the subcommittee today.

Senator GRASSLEY. Senator Domenici would have been here except right now there's a meeting of the Budget Committee Republicans going on in Senator Baker's office. I should be there. I won't be there, as I am otherwise occupied here as you all can see. Senator Baucus may be along later. He is a member of the subcommittee and has a great deal of interest in this legislation.

I don't believe we're going to have any interference from votes on the floor of the Senate. With that, let us proceed.

I would like to welcome Mr. Loren Smith, chairman of the Administrative Conference.

Prior to taking his current position, Mr. Smith served as an integral part of the President's transition team, and is currently on leave from a teaching position at Delaware Law School. In addition, Mr. Smith is a member of the Cabinet's Council on Legal Policy and Management and Administration.

The purpose of the Administrative Conference is to develop improvements in the procedures by which Federal agencies administer regulatory benefits and other Government programs. Its mandate, according to the Equal Access to Justice Act, is to present an annual report to the Congress regarding agency activity under the act. This report was presented to the subcommittee at our hearing last December by Stephen Babcock, executive director of the Administrative Conference.

I see that he is accompanying Chairman Smith, along with Ms. Candy Fowler, counsel for the Conference, and I again welcome you to the subcommittee and I very much look forward to hearing your testimony. So, would you proceed, then?

STATEMENT OF LOREN A. SMITH, CHAIRMAN OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, ACCOMPANIED BY STEPHEN L. BABCOCK, EXECUTIVE DIRECTOR, AND MARY CANDACE FOWLER, STAFF ATTORNEY

Mr. SMITH. Thank you very much, Senator.

At the time I was confirmed by the Senate, in a meeting with you, you asked me, What is the Administrative Conference going to do to help promote the goal of getting bureaucracy and regulation off the backs of the citizens of this country? I still consider that one of the highest goals that this administration can achieve.

REGULATORY REFORM

The Equal Access to Justice Act, it seems to me, is a very important step in the direction of that goal. The act is a major piece of regulatory reform legislation, because it tends to restrain unwarranted and excessive activities of administrative agencies by

making them pay for bringing actions that go beyond the legitimate mandate of congressional statutes.

The Administrative Conference was given, by the Congress, the role of advising the agencies on their regulations under the Equal Access to Justice Act because the Administrative Conference was and is seen as a neutral repository of information about the regulatory process and about administrative law and procedure.

We don't have an ax to grind. We have representatives from virtually all of the executive branch agencies in dealing with regulatory or administrative matters, and from virtually all of the independent regulatory agencies as well.

We have had, historically, a neutral position from which we can look at procedural questions, I think, with an unbiased view. In this act, there was some concern on the part of the Congress that the act ran counter to some of the agencies' interests and that the agencies shouldn't be left to interpret the act themselves.

I think this is a role that the Conference can play—and was set up by the Congress to play—and we would hope would be considered in the future for similar activities.

We favor the reauthorization of this act. The Conference feels that the act has been successful. In part that success is difficult to measure because the awards under the act have been so limited. Its effect, apparently, has been one of deterrence. The very fact of its existence has tended to restrain enforcement and other regulatory activities that go beyond the scope of the law.

With that, let me conclude my statement and give you an opportunity for questions. I might add that, as in typical institutions, the real expertise and knowledge comes from the able members of my staff: Steve Babcock who is chief of staff of the Conference; and Mary Candace Fowler who is the staff attorney who has worked in this area and has read the cases. So, I would say, the easy questions I can answer; the substantive questions probably should be directed to them.

Thank you very much, Senator.

Senator GRASSLEY. Thank you. First of all, as a matter of procedure, your statement will be printed in the record in total.

I have a few questions for either you or your staff.

BOARDS OF CONTRACT APPEALS

You raised the issue of coverage of the Boards of Contract Appeals and the Claims Court under the Equal Access Act in your direct testimony.

Do you know of any policy reasons why their proceedings should not be covered under the Equal Access to Justice Act?

I would also include cases in the Tax Court as well.

Mr. SMITH. No, I don't know of any policy reason why the Claims Court and the contracts boards should not be covered. In discussing this issue earlier, it was our impression that one of the reasons why they were not covered was that they were not a large focus of the legislative hearings in the consideration of the act. In fact, it seems to me anomalous that they are not covered.

Mr. BABCOCK. I do have one thing to add, if I may, Senator.

Senator GRASSLEY. Yes.

Mr. BABCOCK. At least one of the stories that was recurrently told in the hearings, on both sides of the Congress, concerned a problem that a contractor was having with a Government agency, and I have always had the impression that most of the Senators and Congressmen thought that this act would give relief in that particular situation that they were hearing about. I think all of your staff who know the legislative history know the case I'm talking about. It involved GSA and a woman who furnished protective services.

TAX COURT CASES

Senator GRASSLEY. Also, I want your view on cases in the Tax Court.

Mr. SMITH. Well, there is one comment I would make. Under the modification proposed by the committee in S. 919, the Tax Court would be left uncovered, while tax cases that were adjudicated in the district courts would be covered by the Equal Access to Justice Act. That seems to me to be a result that shouldn't occur. It would just encourage people not to use the Tax Court.

I would make one additional comment that comes from my own knowledge as someone who was formerly involved in electoral politics. The concern, I think, of the citizenry is just as strong for the kind of abuses the Equal Access to Justice Act was designed to prevent in the tax area as in any other regulatory area.

In fact, the tax area is the one that probably most impacts on the individual citizen and small businesses, and those concerns, it would seem to me, would argue strongly for equal treatment of tax cases and other regulatory types of cases.

Senator GRASSLEY. Can you tell us how many awards have been granted under 5 U.S.C. 504?

Mr. BABCOCK. We have statistics through December 31, which are more or less complete, I believe. Ms. Fowler?

Ms. FOWLER. That's right. At that time, no awards had been granted in administrative proceedings by final decision. There was, however, one settlement of an application for an award in a case before the Occupational Safety and Health Review Commission.

The Labor Department settled that case for $6,800. Otherwise, through December 1982, there had been 123 applications filed. We have records of that one, which was granted by settlement, and of 42 that were denied or disposed of without an award. One of the reasons why there were so many filed that have not been disposed of is that some of those were cases before contract appeals boards. We don't have any record of what happened to those cases, but I suspect that after the Federal circuit decision in *Fidelity Construction* many of those probably have been dismissed by the contract appeals boards.

PROBLEMS WITH EQUAL ACCESS TO JUSTICE ACT

Senator GRASSLEY. Let me preface my question by saying that it seems to me that there have been very few awards.

Ms. FOWLER. Yes.

Senator GRASSLEY. Does that indicate to any of you that there are problems with the act?

Ms. FOWLER. From my perspective, if I may, it indicates a small problem, perhaps, with delay. As I say, there have not been many applications filed, but they aren't being decided perhaps as fast as they could. In terms of the ones that have actually been denied, many of them seem to have been because of a finding that the Government's position was substantially justified. Often because the case turned on issues of credibility, which seems a reasonable interpretation of that act.

One other problem that has shown up in some of the denials at the administrative level is a problem with the 30-day deadline for filing applications.

There are a number of cases in which applications were denied because they had been mailed before the 30-day deadline but were not received until afterward. So that would be one other problem I see with the act at the administrative level.

Mr. SMITH. Senator, may I also add, one of the causes of the sparsity of awards may well be that the appointees of the current administration are being reasonable in their enforcement efforts and are not pushing enforcement to extremes that go beyond statutory limits.

Senator GRASSLEY. Currently, there is no specific language in the act allowing the agency to review the adjudicative officer's decision, though, as a practical matter agencies are doing this.

Do you feel that specific authorization is necessary in the legislation in order to continue this practice?

Mr. BABCOCK. We see no problems with the present practice as it has developed. There is a theoretical problem, or possible problem, in the way the act was drafted, but that has not proved to be a real problem so far as we know.

Senator GRASSLEY. What are the policy reasons for allowing the agencies to review these decisions?

Mr. BABCOCK. Well, the only way that anyone can get money from an agency is through an agency action. An administrative law judge, unless there were much more radical changes in the way agencies are organized, simply can't force the comptroller of the agency to disburse money.

Moreover, if you had each administrative law judge in an agency making decisions on his own without review, you would not have uniformity. So, we are in favor of giving agencies a chance to review the initial decisions of the administrative law judge on this question, just as they do in the underlying case.

INTERIM AWARDS

Senator GRASSLEY. In our hearing last December, the Justice Department advocated a change in the law to prevent the granting of interim fees. Do you feel that the goals of the act would be furthered or hindered by such a change in the act?

Mr. BABCOCK. Interim fees have not been a problem at all at the agency level, and in general have not been a problem in the court level.

Clearly, Congress contemplated interim fee awards. The legislative history contains many references. However, it is a little bit difficult to see how interim fee awards—even though they may be a

good idea in litigation under the Civil Rights Act—how they fit into the scheme here. I would say that we don't see interim fee awards as a problem, but we would certainly have no objection to the Justice Department's suggestion.

QUESTION OF DISPROPORTIONATE FEES

Senator GRASSLEY. The Department has also advocated an amendment to require that fees not be disproportionate to the amount of the controversy.

Do you feel that this is necessary?

Mr. BABCOCK. We feel that that's directly contrary to the purpose of the act.

Mr. SMITH. It seems to me that in large part the act was designed to prevent that issue being used as a lever against the small businessman who would decide that the controversy is not worth the amount of the legal fees.

I think it's to the interest of both the Government and society to encourage people who think they're right, and are right, to litigate just on the principle.

If you don't do that, an agency may engage in abuse by small amounts, and I think, as my executive director said, that that's exactly contrary to the purposes behind the law.

Senator GRASSLEY. Thank you very much. That's all I have, and I want to thank you for your appearance here.

[Submitted statement of Mr. Smith follows:]

Prepared Statement of Loren A. Smith

Mr. Chairman and Members of the Subcommittee:

Thank you for giving me the opportunity to testify before you today on S. 919. With me today are Stephen L. Babcock, the Executive Director of my Office, and Staff Attorney Mary Candace Fowler.

Based on our experience with the Equal Access to Justice Act, we support this legislation to extend it. S. 919 also amends the payment provisions of the Act and reconciles the court and agency eligibility provisions, and I think that these are important improvements. In addition, I feel there are other amendments to the Act that the Committee should consider during this reauthorization process; I will discuss these in a moment.

As you know, the Administrative Conference of the United States is a Federal agency whose mission is to perform studies and to recommend improvements in the administrative procedures used by all Federal departments and agencies. The Conference's unusual structure — its membership consists of both designated representatives of Federal agencies and volunteer public members, who are distinguished private practitioners, law professors, and members of state government — gives the organization a broad perspective and, as well, enhances the acceptance of the recommendations we develop.

The Chairman and his staff, who comprise the Office of the Chairman, work primarily to assist the Conference membership in their activities. Sometimes, however, the Congress assigns the Office of the Chairman specific tasks in the area of our expertise. Our work on the Equal Access to Justice Act has been one such assignment. Under the Act, the Chairman of the Conference has two responsibilities: to consult with Federal agencies about their procedures for implementing the Act, a task which is now largely completed, and to monitor the Act's operation at the agency level and report to Congress on how it is working. Thus we have worked extensively with the Equal Access to Justice Act and have a continuing interest in it.

Based on this experience with the Act, I believe that it is serving an important purpose. Congress rightly perceived that individuals and small entities in disputes with the Federal government may be intimidated by the government's greater resources. The Act alleviates this problem by helping to recompense parties who have been forced to

bear the expense of litigating against the government when the government's position is unreasonable.

At least so far, the predictions of enormous cost to the government have not been realized. The number and amount of awards under the Act have been relatively modest. And I might add that, in our monitoring of agency activities in administrative proceedings, we have not seen any significant signs of agency misinterpretation of the Act intended to prevent deserving applicants from receiving attorneys' fees.

Delays in implementation of the Act and in processing applications for awards, however, are somewhat problematical. Three Departments — Interior, Education, and Housing and Urban Development — still have not issued proposed rules for handling applications. There also appear to be long delays in some agencies between the filing of an application and the agency's final decision. While these problems probably cannot be corrected by legislation, they may be a suitable focus for committee oversight.

The courts as well appear to be interpreting the Act reasonably and awarding fees against the goverment where they are warranted, with one notable exception. Some courts have held that the position of the government that must be substantially justified in order to avoid an award is its litigation position, not its position in the underlying dispute that led to the litigation. See, e.g., Tyler Business Services, Inc. v. NLRB, 695 F.2d 73 (4th Cir. 1982); Broad Avenue Laundry & Tailoring v. United States, 693 F.2d 1387 (Fed. Cir. 1982). Contra, National Resources Defense Council v. EPA, F.2d _____ (3d Cir., Mar. 23, 1983), 57 U.S.L.W. 2578 (April 5, 1983); Photo Data, Inc. v. Sawyer, 533 F. Supp. 348 (D.D.C. 1982); Berman v. Schweiker, 531 F. Supp. 1149 (N.D. Ill. 1982). As a result, litigants have been denied fee awards even though the government clearly should have resolved the dispute before any litigation occurred. This problem could be corrected by adding a definition to 5 U.S.C. § 554(b)(1), to read:

> (E) 'position of the agency as a party to the proceeding' also includes the agency action that led to the litigation.

The same amendment should be included in 28 U.S.C. 2412(d)(2), referring to the "position of the United States."

Changing these aspects of the Act's implementation might increase somewhat the number of awards granted. Still, there is no reason to believe that a vast increase in the expense of the Act would result. One probable reason the number of awards under the

Act has been small is that government litigators are pursuing few unjustified cases. Thus the Act would appear to be working precisely as it was intended to -- encouraging Federal agencies to review their cases thoroughly before proceeding.

In addition to extending the Act, S. 919 makes some important and useful changes. Clarification of the payment provisions to state that awards shall be paid out of agencies' own budgets will resolve some existing confusion in this area and will promote the Act's purposes by penalizing the agencies that have acted unreasonably. The bill's provision that the court designate the agency responsible for payment is also a helpful one. I note, however, that the proposed amendment to 5 U.S.C. § 504(dX1) of the Act, contained in Sec. 1(2) of S. 919, directs the court to specify the agency responsible for payment, even though the proceedings covered by 5 U.S.C. § 504 are administrative and will be heard by agency adjudicative officers. Moreover, in most cases, only one agency will advocate a position in administrative litigation. I propose that Sec. 1(2) of the bill be revised to read:

> (2) by striking subsection (dX1) and inserting in lieu thereof, "Fees and other expenses awarded under this subsection shall be paid by any agency over which the party prevails from any funds made available to the agency, by appropriation or otherwise, except that no sums may be appropriated to any such agency specifically for the purpose of paying fees and other expenses under this section. When more than one agency has taken a position in a proceeding, the deciding agency shall specify the agency or agencies that shall be responsible for payment of the award."

I also support S. 919's elimination of the apparent disparity between the eligibility requirements for agency adjudications and those for court proceedings. I note that the bill would eliminate the special exemption from net worth requirements for nonprofit organizations; the Committee may wish to consider eliminating the special exemption for agricultural cooperatives as well, in order to leave all businesses and organizations on an equal footing. One additional observation about eligibility: at least one court has ruled that units of local government are not eligible for awards under the Act. Commissioners of Highways of Towns of Annawan v. United States, 684 F.2d 443 (7th Cir. 1982). Assuming they can meet the eligibility standards, I see no reason why state or local governmental units should not enjoy the same access to fee awards as other parties. Certainly they are frequent targets of Federal regulation and litigation, and would suffer as much from unreasonable Federal action as private parties. The Act by its terms does

not appear to bar awards to such governmental units. The Committee may wish to consider clarifying this matter.

The other major effect of S. 919 would be to repeal the special attorneys' fee provisions for tax cases that were included in the Tax Equity and Fiscal Responsibility Act of 1982. The effect of this repeal would be that tax cases in U.S. District Courts would be covered by the Equal Access to Justice Act, while no attorneys' fees would be available in Tax Court cases under either the Equal Access Act or TEFRA. If Congress believes that tax cases should be handled under the Equal Access Act, I suggest that it include Tax Court proceedings as well as District Court cases within the Act's coverage.

Reauthorization of the Equal Access to Justice Act also provides a convenient opportunity to resolve another major issue about the Act's applicability. From the beginning, there has been debate about whether proceedings before agency boards of contract appeals are covered by the Act. These proceedings are neither adjudications under 5 U.S.C. § 554 nor court proceedings, and thus are not directly covered. However, several contract appeals boards have asserted their authority to grant awards under the Act based on section 8(d) of the Contract Disputes Act, 41 U.S.C. § 607(d), which authorizes the boards to grant any relief that could be granted by the U.S. Court of Claims. In the recent case of Fidelity Construction Co. v. United States, No. 27-82 (Feb. 18, 1983) , however, the U.S. Court of Appeals for the Federal Circuit ruled that contract appeals boards do not have authority to make awards under the Act. Moreover, the authority of the reorganized Claims Court to make such awards is also in doubt. Since the new Claims Court is an Article I court rather than an Article III court, it does not fall within the definition of "court" in 28 U.S.C. § 451, which applies to 28 U.S.C. § 2412. This Committee should consider whether contract disputes and cases in the Claims Court should be covered by the Act and take appropriate action. We would be happy to assist in drafting language to implement the Committee's views.

Finally, there are two other items I believe are worthy of the Committee's consideration at this time. First, the 30-day deadline for filing applications for awards after final decision has caused some problems. Courts and agencies have ruled that this provision is jurisdictional and cannot be waived. But it is sometimes hard to determine the date from which the 30-day period runs. For example, is an agency decision "final" when it is issued, when it is served, or when the time for seeking reconsideration has expired? Moreover, awards may be denied where, for example, an application was mailed before the deadline but not received until after the deadline, or where other extenuating

circumstances prevent timely filing. A provision permitting courts and agencies to extend the 30-day deadline would alleviate these problems without defeating the statutory goal that applications for awards be made promptly. This could be achieved by adding a new sentence to 5 U.S.C. § 504(a)(2), to read:

> An agency may, for good cause shown, extend the time limit for submitting an application.

The same sentence should be added to 28 U.S.C. § 2412(d)(1)(B), changed to refer to "the court," rather than "an agency."

Second, the Committee should consider whether to permit confidential treatment of net worth information submitted by applicants for awards. This is a step we have advocated for some time; our model rules for agencies included a provision permitting such treatment to the extent allowable under current freedom of information law. Particularly where there is no real dispute about an applicant's eligibility, I don't believe individuals and small businesses should have to make public this very sensitive information in order to receive an award of attorneys' fees. I understand a representative of the American Bar Association will be testifying further on this issue, and I commend his testimony to you.

I very much appreciate the opportunity to appear before you today. I hope that our testimony as well as our other efforts concerning the Equal Access to Justice Act have been helpful to Congress, and that we can continue to be of service in the future. We will be pleased to answer any questions you may have.

STATEMENT OF HON. DENNIS DeCONCINI, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator GRASSLEY. I would like to now call on Senator DeConcini.

Senator DeConcini, earlier today I complimented you for the part you played in the original introduction and passage of this legislation.

Senator DECONCINI. Thank you. I appreciate that, Mr. Chairman. You performed quite a service yourself when you were in the House and helped the House finally take on this legislation. Senator Domenici and myself and Senator Nelson worked for a long time and we needed that push in the House very desperately and I appreciate your help and comments.

Mr. Chairman, I thank you for the opportunity to appear here before the subcommittee to express my support for the reauthorization of the Equal Access to Justice Act. Simply speaking, this act puts the little guy, especially the small businessman, on equal footing with the Government when he steps forth to challenge unfair regulations or agency rulemaking. This is accomplished through the device of fee shifting. Where the citizen can show the agency's action was unjustified, this citizen can recover his legal fees and other costs of such litigation before the hearing board or administrative judge.

The reason that we are here today is that the provision of the act, as you know, has a sunset provision which expires October 1, 1984, 3 years from the time of the act's implementation. The problem of wasteful and unfair Government regulations and the relative powerlessness of our average citizens to challenge the vast resources of the Government are as important today as they were when the act was originally passed. As you know, Mr. Chairman, it passed overwhelmingly in the Senate in 1979 by 94 to 3. This act is a well conceived piece of legislation, a good idea made better by the suggestions and objections of its supporters and opponents.

I will submit for the record the balance of my statement, Mr. Chairman. I do want to just add something that has come to my attention and I hope the committee will take a look at it, and that is perhaps raising the net worth cut-offs for the individual and the small business, some increase over the $1 million for an individual and the $5 million figure for organizations. When we put this together, I remember so well spending some time with Senator Nelson, who was chairman of the Small Business Administration Committee at the time, working out this figure. Even after considerable effort it remained somewhat of an arbitrary figure.

It seems to me that if these figures were raised to $2 million and perhaps $7 or $10 million, you would include additional small businesses that today might very well have difficulty in financing substantial litigation. I hope the committee might give this proposal some consideration as they move toward markup.

I would ask the balance of my statement be put in the record in order to save the committee time.

Senator GRASSLEY. So ordered.

Thank you, Senator, At this point I would like to invite you to remain and ask questions of the other witnesses.

Senator DECONCINI. I thank the chairman, and I may do that for a few minutes.

Senator GRASSLEY. I do have some questions I would like to ask you; however, if you must leave I understand.

Senator DECONCINI. No, go right ahead.

Senator GRASSLEY. Would you explain for us the background which led to the inclusion of an exception to the financial criteria section for agricultural cooperatives in the Equal Access to Justice Act?

Senator DECONCINI. Yes, I will, Mr. Chairman.

In the West, and I suspect in other parts of the country, small farmers often band together to form agricultural cooperatives. They have often been considered as a unit, particularly in determining their assets for insurance and borrowing purposes. Such aggregate treatment would cause the whole cooperative to exceed the $5 million limitation.

We did not want to prohibit a small farmer who belongs to a cooperative from contesting Government action in the name of the cooperative, and being able to recover reasonable costs.

I think history has shown that the bill has not been abused by cooperatives or anyone else for that matter. The amount of the recoveries have not been large, and I felt this provision was justified then, as did, of course, the Judiciary Committee. I would suggest that it be retained.

Senator GRASSLEY. Can you provide some clarification for us on the subcommittee as to what the term substantial justification means as embodied in the original act. We've had a variety of court cases that have interpreted this standard, and we have decisions that range from Government conduct which must be reprehensible in order to recover fees to conduct which must be slightly more than reasonable.

Though legislative history seems to indicate that substantial justification means reasonable in law in fact, as I recall the reasonableness standard was specifically rejected in the original bill.

Can you shed any light on this for us?

Senator DECONCINI. Well, Mr. Chairman, you pretty well spell it out. In my recollection, and I think the testimony before this committee of some 3½ years ago will indicate, we struggled with it, and it was a question raised in the same manner that you have it raised here.

We rejected reasonableness based on a number of court decisions—I can't cite them to you. I'm sure they're available from the committee staff—and we wanted to find something that would tell the court that we wanted a little bit more than just a reasonable justification by the Government. We came up with the word "substantial." In reality, the court has applied what I believe to be a "reasonable" standard even in this area.

Senator GRASSLEY. So you got less than you wanted?

Senator DECONCINI. Yes. I would like to see it a little bit stronger. I don't have a specific suggestion, however, to go any further than substantial. I would recommend some language or comment indicating the subcommittee intends a slightly higher burden on the Government than mere reasonableness.

Senator GRASSLEY. We've heard that litigants seem to be encountering some difficulty in collecting fees after an award has been made.

A possible solution has been suggested that a check must be written within 60 days after an award has been granted, with an addition of interest if that provision is not complied with.

Do you feel that this would further the objectives of the act?

Senator DECONCINI. Mr. Chairman, that is an excellent suggestion, and you, or whoever has come up with it, is to be commended. I think that would be a most proper addition to this act and one that would expedite its goals. It would certainly give a signal that the Federal Government must pay its bills like anyone else. We don't want to be harsh. We want to be sure that it's a fair hearing, but once the award is made, there's no reason for the Federal Government not to be able to expedite its prompt payment, and I think that's an excellent idea, Mr. Chairman. I would endorse it very strongly.

Senator GRASSLEY. I have no further questions, and once again, I wish very sincerely to thank you for your leadership in this area.

Thank you very much.

Senator DECONCINI. Thank you, Mr. Chairman.

[The statement submitted by Senator DeConcini follows:]

PREPARED STATEMENT OF SENATOR DENNIS DECONCINI

I thank the chairman for the opportunity to appear before the subcommittee and to express my support for the reauthorization of the Equal Access to Justice Act. Simply speaking, this act puts the little guy, especially the small businessman, on an equal footing with the Government when he steps forth to challenge unfair regulation or agency rulemaking. This is accomplished through the device of fee-shifting. Where the citizen can show that the agency action was unjustified, this citizen can recover his legal fees and expenses.

The reason that we are here today is that the provisions of the act are subject to a sunset provision and will expire on October 1, 1984, 3 years from the act's original implementation. The problems of wasteful and unfair governmental regulation and the relative powerlessness of the average citizen to challenge the vast resources of the government are as important today as they were when the act originally passed the Senate in July 1979 with overwhelming approval, by a vote of 94 to 3.

The Equal Access to Justice Act is a well conceived piece of legislation; a good idea made better by the suggestions and objections of its supporters and opponents. It is an efficient approach to the problem it addresses. For example:

(1) Its aid is targeted. Only citizens who need help receive it. Fees are available to individuals with a net worth of $1 million or less, and organizations with a net worth of $5 million or less.

(2) Only unjustified agency action is penalized. Where good cause existed for the regulation, the agency need not fear lawsuits.

(3) The Act makes the citizen the watchdog of the federal bureacracy. The regulated are in a good position to see which among the plethora of regulations are wasteful or ill-considered.

(4) In the Senate passed version of the Act, and the re-authorization bill S. 919, agency accountability is maximized by exacting payment of the legal fees and expenses directly from the budget of the agency whose unjustified regulation resulted in the lawsuit. I hope that this re-authorization bill will return to that standard.

The Act has proven to be a real bargain. When the original Act was being debated, estimates of first year costs alone exceeded $100 million. In fact, costs as of the first year report by the Administrative Conference of the The United States were closer to $1 million. However, the low first year costs of the Act should not be misinterpreted as a signal that the Act's provisions are ineffectual.

The beauty of the Act is that as it works, it will reduce its own costs. The Act attacks the problem of unjustified and wasteful regulation with a double-edged sword. The first edge serves the public interest by funding lawsuits that challenge and eliminate unfair, wasteful rules and regulations. The second, cost cutting edge

is, that the Act, by taking the fees from the offending agency's budget, strongly motivates agencies to modify their behavior and to exercise caution prior to imposing rules and regulations. on citizens.

I thank the Chairman and the members of the Subcommittee for their continued interest and support of this legislation. I believe the record you will establish here today will prove the need for and the wisdom of the re-authorization of the Equal Access to Justice Act.

Senator GRASSLEY. Senator Baucus would you please come to the witness table. I indicated in my opening statement that you were quite involved in this legislation during the last session, especially regarding attorneys fees in tax cases and that you originally sponsored similar legislation before I came to the Senate. It was your legislation that became part of TEFRA. I want to say once again thank you for coming, and, if you have time, I would appreciate it very much if you would stay and help us in the questioning of witnesses.

You may proceed.

STATEMENT OF HON. MAX BAUCUS, A U.S. SENATOR FROM THE STATE OF MONTANA

Senator BAUCUS. Thank you, Mr. Chairman. I'll be very brief. I would like to include my entire statement in the record.

Essentially, Mr. Chairman, I am here to make one point, and that is we should not go backward. I understand the bill to essentially undo some provisions we enacted last Congress. I think that's a mistake. I think rather we should maintain the present provisions with respect to attorneys fees, that is, allowing taxpayers to recover in those cases where the Government is unreasonable, and then proceed further to strengthen that provision to the degree we think appropriate, rather than going back and repealing what we did in the past and starting from a backwards position, to move further forward.

That's my statement, that's my position, and I hope that we and the committee act accordingly. Just to repeat, it does not make sense to me to undo some progress. Rather, it makes more sense to stay where we are and strengthen it, from the point of view of taxpayers, so they can be in a stronger position, to the degree that seems appropriate, balancing inequities, and so forth, rather than going back and repealing section 6 of the bill, or repeal the language of section 6 of the bill.

Senator GRASSLEY. Thank you, Senator. Your entire statement will appear in the record in its entirety.

From my personal standpoint, I think the best way I can assure you would be to repeat a statement that I had given in my opening statement in which I say this about S. 919. Let there be no mistake that this subcommittee will take no action to weaken the position of taxpayers in recovering attorneys fees from the Federal Government. We will, instead, be reviewing ways in which to strengthen the citizens' position.

Senator BAUCUS. Thank you, Mr. Chairman. With that assurance, I won't take up any more of the committee's time, and you can go on to other matters.

Senator DECONCINI. Mr. Chairman, if I could just say, I wanted to reassure Senator Baucus also that at least this Senator, and I'm

glad to hear the chairman's statement, that's not the intent of the bill. As you know we went through this and the bill that you passed was very substantial, and in my opinion very important, and I would not want to see us take a step backward. And I know that if it isn't corrected here I would be glad to join in full committee or wherever to see that those provisions are maintained.

Mr. Chairman, I would also like to point out the significant influence by the Senator from New Mexico in this legislation. Actually when we passed it the last time he was still in the minority, but played a key role there, and a great deal of credit goes to Senator Domenici.

Senator BAUCUS. I thank the Senator.

Senator GRASSLEY. Senator Domenici regrets that he is unable to be here.

Do you have anything more you want wish to add?

Senator BAUCUS. That covers it.

Senator GRASSLEY. I appreciate your testimony very much. You were so cooperative in working out what became law in December 1981, regarding fees in Tax Court cases, rest assured we will be moving forward not backward in that area.

Senator BAUCUS. Thank you, Mr. Chairman.

[The prepared statement follows:]

PREPARED STATEMENT OF SENATOR MAX BAUCUS

Mr. Chairman, I'd like to say a few words about section 6 of S. 919. This section would repeal an important law we passed less than a year ago. By doing so, it would prevent many taxpayers from recovering attorney's fees against the Government. Such a result would be inexplicable and unjustified.

Let me remind you of the history of this issue.

The Equal Access to Justice Act generally permits attorney's fees awards when the Government's position is unreasonable. But it does not apply to Tax Court cases, where over 80 percent of the tax litigation occurs. As a result, it actually permits very few taxpayers to recover attorney's fees from the IRS.

This result seemed unfair. So we attempted to change it. In the last Congress, Senator Grassley and I each sponsored legislation that would permit attorney's fees awards in Tax Court cases. Extensive hearings were held. Delicate compromises were worked out.

The final result of all this work was that the Baucus-Grassley concept was enacted as section 292(A) of last year's "TEFRA" tax law. This section permits taxpayers who prevail in any civil tax action to recover attorney's fees, up to $25,000, if the Government's position was unreasonable.

This was a significant victory for taxpayers. Section 6 of S. 919 would surrender that victory. This disturbs me.

I understand that there may be some technical criticisms of section 292(A). We've gone through these all before, when we considered the bill in 1979, 1980, 1981, and 1982.

Now, Congress has better things to do than relegislate last year's laws. Especially when the result would leave many taxpayers unprotected against high-handed IRS litigating tactics. Therefore, I strongly oppose section 6 of S. 919.

We can strengthen this provision. But we should not weaken it with the new language of section 6.

Senator GRASSLEY. Now, the next witness. We are pleased to have Mr. Paul McGrath with us today to present the views of the Department of Justice. Mr. McGrath is a graduate of Harvard Law School. Prior to joining the Reagan administration, Mr. McGrath practiced law with the firm of Dewey, Ballantine in New York City. He is currently serving as Assistant Attorney General of the Civil Division of the Justice Department.

The subcommittee extends its appreciation to Mr. McGrath, and I look forward to hearing his testimony on this act. I would like to add that he's been very faithful so many times, coming before our committee, with a well thought out position, and working with our staff as well. You've devoted more than a fair share of your time to the work of my subcommittee, and I want to thank you not only for your present appearance but for all your previous appearances as well. Please proceed.

STATEMENT OF J. PAUL McGRATH, ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, DEPARTMENT OF JUSTICE

Mr. McGRATH. Thank you very much, Mr. Chairman.

First, I'd like to say I am very pleased to be here today to testify with respect to S. 919, a bill to amend the Equal Access to Justice Act, and I would request that the statement that was submitted on behalf of the Department of Justice be printed in whole in the record of this proceeding.

Senator GRASSLEY. Without objection, so ordered.

Mr. McGRATH. And I would like just to summarize a couple of points that seemed to us most significant. First, I would like to reaffirm what I told the subcommittee before, that the administration continues to very strongly support the Equal Access to Justice Act and whatever improvements to that act this subcommittee and the Congress would see fit to enact.

Small businessmen and private individuals simply should not be deterred from challenging unreasonable Government action because of the cost of litigation, nor should they bear the cost of such a challenge where they're successful.

In the past, we have proposed some changes to the Equal Access to Justice Act, many of which are of a somewhat technical nature. We note that S. 919 deals with some of those proposals, and in particular with the definition of "party" under the act.

One slight problem we do have with S. 919 has to do with the funding of Equal Access to Justice Act judgments. Under the law as it now is, and as it has been interpreted by the Justice Department, where there is an attorneys fee award on the basis of unjustified agency action, that judgment is to be paid out of an agency's appropriations. What the proposed amendment to the Equal Access to Justice Act would do would in effect bar Congress from appropriating additional funds to pay for the judgment.

We believe that this might create a little bit too much of a straight jacket if it were enacted. The reason for that is this: It does seem to us to make sense that in the ordinary course, judgments would be paid out of agency appropriations. If it's the agency that acted unreasonably, their appropriations ought to cover the judgment. That is a way, hopefully, to deter conduct of agencies that is unreasonable.

However, you could have this situation, and indeed we came close to it a couple of times in the last year. You could have a situation where an agency, if it has to pay a large attorneys' fee judgment, would not have funds to carry out some mandated responsibility that it has from Congress. If that was the case, I would think Congress would want to exercise its judgment as to whether it

should augment the agency's appropriation, obviously in the process making the agency come before it to explain its conduct. We would think that the kind of oversight role that Congress would play would both provide for an opportunity for the agency to carry out its other responsibilities and also, to pay the judgment out of its own appropriations.

We have listed six suggested changes to the Equal Access to Justice Act which are not included in S. 919. I will mention only two of them. That is, first we suggest a clarification of when the time starts to run from which the 30 days or the time period for filing an attorneys fee award is calculated; and, second, on the question of interim fee awards. In both of those instances, we have found in actual litigation that the current act is ambiguous, or causes problems.

The act now is ambiguous as to when the 30 days starts to run. We fear that that may penalize some people who wait till the wrong date, and we believe that just a simple clarification would solve that problem. As to interim fee awards, the current problem is that while interim fee awards are possible under the act, and, indeed, have been required in at least one case, as a general matter, such interim grants of fee awards are not appealable. So we get into the situation where we have an interim award which we may have to pay and then at some time later it can be appealed and maybe overturned on appeal.

We think it makes more sense either to provide for the appealability of such interim fee awards, or to provide that such interim fee awards do not have to be paid until the date when the final judgment would have to be paid.

We note that S. 919 would repeal the provisions of the Tax Equity and Fiscal Responsibility Act of 1982 relating to attorneys fees, and in particular would apply the Equal Access to Justice Act to tax cases in the district courts, and I believe, eliminate any attorneys fees provisions in tax cases in the Tax Court. We would urge that that not be done for this reason: The Equal Access to Justice Act originally exempted the Tax Court from its ambit. And I believe that the reasons for that were that there were particular problems which are raised in Tax Court litigation which are different from those raised in the normal district court litigation.

In particular, there is a very troublesome caseload problem in the Tax Court, which has been increasing over the last several years. The Tax Court litigation generally includes deficiencies, taxpayers deficiencies, and those deficiencies now amount to as much as $5 billion. In addition, the procedures in the Tax Court are different. Normally, matters are handled on stipulation, and there are other differences.

The Tax Equity Act was designed to provide a system which would reflect the fact that tax litigation in the Tax Court is different from the district courts. But yet there are situations where it makes sense to provide for attorneys fees in the Tax Court, and the structure of that act, although somewhat different from the Equal Access to Justice Act, seems to me makes a good deal of sense in the Tax Court setting. That act has only been operative for about a month and a half. And we believe it makes sense for that provision to continue in effect in the Tax Court.

As far as the district courts are concerned, that same statute applied the same provisions to the district court. We think it makes sense to continue that parity of treatment, one of the reasons being that there is so much forum shopping in Tax Court litigation as it is, that we fear that amending the act in this respect would simply compound that problem.

We think that the procedures, in short, under the Tax Act do make sense, do provide for a substantial recovery to the taxpayers where there has been unreasonable conduct. And we would urge that the current bill, at least be given more of a trial period than a month and a half. We don't know of any real showing that there is such a problem in continuing this experiment at least for a while longer that it should be undone so quickly. And therefore, we urge that TEFRA, that aspect of the tax bill not be changed.

Senators, those are the remarks that I wanted to make, and I, of course, would be happy to answer any questions that the committee may have.

Senator GRASSLEY. Thank you. Your prepared statement will be made a part of the record.

As mentioned earlier, it's been suggested that the act be amended to require payment to be made to a litigant within 60 days after an award has been granted. Does the Department have any views on that proposal?

Mr. MCGRATH. Senator, we have generally opposed that proposal for this reason: Right now under the statute that provides for interest on judgments against Government we believe that attorneys fees, awards and other cost awards are exempt. We don't think it's necessary to change that at this point because at least to our knowledge there has not been a substantial problem of delay in paying awards. It is true that there are procedures which sometimes delay the payment of awards beyond 60 days.

Some of the reasons for that, of course, include the fact that all payments have to not only be agreed to and certified by the Attorney General or his delegate, but they also have to be agreed to and certified by the General Accounting Office. And although it is our procedure to try to move these ahead as quickly as possible, that cannot always be done within 60 days. In addition, we do consider after award whether or not to appeal, and as the Senator is aware, the Department of Justice, in cases it has lost, appeals only a fraction of those cases. It only appeals those cases where it feels that the case has some special merit on appeal.

We think it also makes sense, therefore, to allow some period of time to consider whether an appeal will be taken because if an appeal is not warranted, we generally will not appeal it, and obviously the taxpayer is better off if there is no appeal. I would be concerned that an artificial deadline might push lawyers to decide to appeal in cases where perhaps on reflection based only on the merits of the case they would not appeal. Consequently, I don't think the statute should be amended in that respect.

Senator GRASSLEY. Thank you. In your testimony you referred to constitutionality. On that point I would like to state that the Department of Justice does not always defend constitutionality of statutes, for example, legislative veto, and I might add I'm quite disappointed that the Department has taken such a position.

Can you cite me an example where the defense of the constitutionality of a statute has been held to be unreasonable or not substantially justified under the Equal Access to Justice Act?

Mr. MCGRATH. No, Senator. Let me just say that our policy, of course, is that with two exceptions we always defend the constitutionality of statutes. One of those exceptions is if it appears over the passage of time or because of some intervening Supreme Court decision or some such event as that the statute is clearly unconstitutional, then that would be an exceptional case. That has not happened to the best of my knowledge at least during this administration. The other situation is where there is the limited situation where a statute seems to infringe on the prerogatives of the executive branch. The legislative veto cases, of course, are the classic example of that.

In all other situations, we do defend the constitutionality of statutes, and look upon our role as really defending Congress as lawmaker, and the President as lawmaker in his role under the presentment clause of article I. It has not yet occurred, at least to the best of my knowledge, that a court has held that the action of the Department of Justice in defending the constitutionality of a statute was unjustified conduct.

I think, however, it is so clear that a litigant could make that argument in the future if a court dismissed a statute as patently unconstitutional, that I would hate to see that factor possibly inhibit a decisionmaker at the Department of Justice in the future as to whether the Department of Justice would carry out its very important function of defending the constitutionality of statutes. Therefore, we would urge that since in this particular role the Department of Justice is acting at least as much on behalf of the Congress as it is on behalf of the President, that that role be exempted from the Equal Access to Justice Act.

Senator GRASSLEY. Why does the Department favor the position that final judgment occurs when the court enters an appealable order rather than when the right to appeal the order lapses?

Mr. MCGRATH. Well, it's for this reason of efficiency. If the time, the 30 days starts to run from the date of the final order, then it seems to us that the time to file the attorneys fee application ought to start running at the same time so that the application can be made during the time that the right to appeal is running. Then the application can be gotten in, the attorneys fee question can be decided, and both the merits of the case and the attorneys fee question can be taken up at the same time.

If the 30 days starts to run from the date when the appeal has to be filed, then the appeal will have to be filed, and then the attorneys fee question may or may not be able to go ahead. If the court rules that it is divested of its authority to consider that question because the matter is on appeal, then the appeal will go all the way up and the attorneys fee question will not get decided until perhaps years later.

It seemed to us that that isn't really as efficient a way to do it as it is to have the two time limits run from the same point.

Senator GRASSLEY. We have a model rule that's been published by the Administrative Conference relating to the recovery expenses. Would the Department comment on that rule. It provides

for recovery of attorney out-of-pocket expenses ordinarily chargeable to clients, in addition to hourly attorneys fees, and, if paralegal time, telephone charges, or photocopying are normally charged to a client, then they would also be recoverable, and does the Department disagree with that position?

Mr. McGRATH. Yes, Mr. Chairman, we do. We feel that the expenses that should be properly awardable under the Equal Access to Justice Act ought to be those expenses that are truly court costs, such as transcripts, fees of expert witnesses, and things like that.

The problem with extending it to expenses that are customarily charged by lawyers to their clients is that that can extend to quite a wide variety of things, and could substantially increase the cost without any great benefit here. For example, if a law firm is traditionally charging stenographic services or some fraction of overhead, or things like that to its client, you could get a great extension of the costs chargeable under the Equal Access to Justice Act.

It seems to us that it makes much more sense to look to the fee cap in the act, $75, and to say that really ought to cover the lawyer, it ought to cover his office, and those other things like that. And to the extent he has actual out-of-pocket, taxable court costs, then those should be added on. But not anything else.

Senator GRASSLEY. You advocate retaining the provisions relating to the recovery of attorneys fees in TEFRA. Would you say that there is no difference in placing the burden on the Government to show that its actions were substantially justified and in placing the burden on the taxpayers to show that the Government's actions were unreasonable? Under which situation would the taxpayer be more likely to recover fees?

Mr. McGRATH. Senator, I'm not sure I can answer that question. I did hear——

Senator GRASSLEY. If you can't answer it, can you help us through written response?

Mr. McGRATH. Well, I can supply an answer, but I'm not sure how much it will advance the debate is what I'm saying. I did hear Senator DeConcini say that originally the idea was that substantially justified would be a somewhat higher standard than reasonableness. And I agree with him that in fact many of the courts have equated substantially unjustified with reasonableness.

I think the problem is that once you start looking at individual cases, and you look at the question of whether the Government did the right thing, whether you say it was reasonable or not, or was it substantially justified or not, you're really looking to the same thing. Was it fair? Was there some justification for doing it? Was there an arguable basis for doing it? Or was the action of the Government agency so off base that it wasn't the right thing to do?

I think in looking for the standard under these statutes, we're really looking for that kind of thing: Did something happen to this taxpayer that was wrong, that was unconscionable, that was just beyond the statutory authority of the agency? I don't think it's a bad thing to have this standard fairly general, though.

We actually are looking at cases on an individual basis. The court has to look at an individual situation and say, well, what happened to that taxpayer? Or what happened to that business in that situation? Was it bad? Was it wrong? Was it something that

we all would generally agree was so outrageous he shouldn't pay attorneys fees for it.

Senator GRASSLEY. Well, let me take a little different angle on the same question. How about the significance of where the burden is placed?

Mr. MCGRATH. Well, of course, the burden is different.

Senator GRASSLEY. The burden is on the government in one case; the burden is on the taxpayer in the other case.

Mr. MCGRATH. Under TEFRA the burden is on the taxpayer, and under Equal Access to Justice it's on the Government.

I think one reason the discrepancy makes sense is if you look at the procedures that are followed in the Tax Court, as I understand, they involve mostly hearings on papers and an obligation of the taxpayer to come forward if he has an attorneys fee case, and to specify what his grounds are, and then if he has really raised some substantial question, then the Government would respond.

As an administrative matter, we think that makes sense, because there are so many cases in the Tax Court—it's estimated that there will be as many as 60,000 deficiency cases by the end of this year—that presents such a substantial financial burden, because these are as much as $5 billion of deficiencies. To permit people who haven't paid their taxes to add on to that a frivolous claim for attorneys fees which the Government then would have to disprove, we think is tipping the balance too much in that circumstance, particularly given the enormous caseloads in the Tax Court, which I think we shouldn't turn our eyes away from; 60,000 cases is more than 25 percent of the number of all the civil cases in all the Federal district courts put together. It's just an enormous, backbreaking workload.

Senator GRASSLEY. Let me move on, then, to another question. As I am sure you are aware, the courts have consistently found against the Department's position regarding the award of fees incurred prior to the effective date of the act. I believe the intent of Congress was to include all fees incurred in pending cases.

What type of congressional action would be necessary in order for the Department to stop taking this position in litigation, and is legislative history sufficient, or is a statutory change necessary?

Mr. MCGRATH. Senator, I think to compel the Department of Justice to change its position, I believe, a statutory change would be necessary. As we read the act, we believe that our normal obligation to construe waivers of sovereign immunity narrowly does apply, mainly because the purpose of this act is to encourage people to sue where there has been unjustified Government action. That purpose can't possibly be applied to some lawsuit that was started well before the October 1, 1981, effective date of the statute. There was no indication whatsoever in the legislative history surrounding this statute that Congress intended that fees incurred before that date be recoverable under the Equal Access to Justice Act.

So we believe that under that statute, the position that we've taken, not only was reasonable, but was mandated. Now, obviously, if Congress amended the statute, we would take a different view, but that is the reason why we have taken the position that we have now taken.

Senator GRASSLEY. My last question refers to a bill that Senator Sasser put in on April 12, along with cosponsors Baucus and Dixon, to include the Boards of Contract Appeals under this act. Does the Department have a position on whether or not to include those boards under EAJA.

Mr. MCGRATH. We do believe that under the act as now written, it's clear they are excluded. A lot of the Boards of Contract Appeals do have very substantial caseloads, and adding an attorneys fee provision could encourage cases that otherwise might not be brought. I think we would feel that if there is some demonstrated need for extending the statute in this respect, that would be one thing, but we haven't really seen that need shown in any way.

Senator GRASSLEY. That's the last question I have. I want to thank you for your testimony and I know that you'll be working with us as we try to develop this legislation in committee and on the Senate floor. Thank you very much.

Mr. MCGRATH. Yes, Senator, we very much would like to do that.

[The statement submitted by Mr. McGrath follows:]

Prepared Statement of J. Paul McGrath

Mr. Chairman and members of the Subcommittee:

I am pleased to have the opportunity to appear before the Subcommittee on Administrative Practice and Procedure to discuss the amendments to the Equal Access to Justice Act contained in S.919.

I appeared before the Subcommittee on December 9 of last year to discuss the implementation of the Equal Access to Justice Act and potential modifications to the Act. At that time I stated that in light of the small number of Equal Access to Justice Act cases decided by the courts, it was too early to assert an opinion on the effectiveness of the Act. The four months which have passed since my last appearance have not changed this judgment.

I can unequivocally state that the Administration is in full agreement with the stated objective of the Act. The passage of the Act rose from the realization that the cost of litigation deters certain individuals and small businesses from challenging unreasonable government actions (House Report 96-1418 p.5). The Act was intended to promote agency accountability by providing the means for the challenge of unjustifiable government action.

At the hearing this Subcommittee held on December 9, 1982, I outlined several concerns the Department had with the Act and suggested several modifications. Among the changes we suggested were, first, providing that an agency may review an adjudicative officer's fee award determination. Second, we suggested that the statute be amended to precisely define the term "final judgement" contained in 28 U.S.C. 2412 (d)(1)(B) to make clear when a party must submit an application for fees. Third, we suggested that

interim attorney fees be prohibited or that the award of interim fees be made appealable directly when the award is made. We also suggested that awards not be made where the agency is defending the constitutionality of a statute. We suggested that the Act be amended to more precisely define the term "fees and other expenses" found in 28 U.S.C. 2412 (d)(2)(A) and to deny fees if an applicant seeks an unreasonably high award. We raised the problem of the source of payment for fees under the Act. Lastly, we suggested the need to clarify the differences in the definition of a "party" under the administrative and judicial provisions of the Act.

Further, I pointed out to the Subcommittee our concern about certain court decisions awarding judgments for fees incurred prior to October 1, 1981, the Act's effective date. We continue to believe that such retroactive application of the Act could result in a budgetary drain not contemplated by Congress and is contrary to the Act's purpose of aiding litigants who, without financial assistance, would find it difficult or impossible to bring their complaint against the federal government to court. Awarding fees for attorneys' efforts occuring prior to October 1, 1981 does not serve this end. We continue to present this view in litigation.

S.919 reauthorizes the Equal Access to Justice Act. In addition, several changes are made to the Act. The drafters of S. 919 have addressed two of the issues I raised with the Subcommittee in December. The following remarks will address these and other changes contained in S.919, and reaffirm our support for other changes we suggested in December.

As noted in my December testimony, there is a discrepancy in the current Act between the definition of the term "party" in 5 U.S.C. 504(b)(1)(B) and 28 U.S.C. 2412 (d)(2)(B). Section

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504(b)(1)(B) of Title 5, which in defining the term "party" sets out the criteria which those seeking attorney fees in agency adversary adjudication must meet, states that a business which employs no more than 500 persons is eligible if its net worth is less than $5 million. Section 2412(d)(2)(B) of Title 28, which defines parties eligible for award of fees in judicial proceedings was, according to the legislative history, intended to be identical to the definition in Title 5. Rather, if read literally, it would make eligible corporations having no more than 500 employees regardless of whether their net worth is over $5 million. In my December 9 comments I recommended that 28 U.S.C. 2412 (d)(2)(B) be amended to conform to the definition of party found in Title 5. Section 2 of S.919 accomplishes this.

On the question of funding, S.919 has eliminated the possibility contained in the present Act that payment of judgments under 5 U.S.C. 504 and 28 U.S.C. 2412(d), involving awards in administrative and judicial adjudications where the agency position is not substantially justified, may be made from the judgment fund or from sums specifically appropriated to agencies for payment of attorney fee awards. Instead, the bill specifies that such awards must be paid by the agency from funds made available to the agency "except that no sums may be appropriated to any such agency specifically for the purpose of paying fees and other expenses". Awards under 28 U.S.C. 2412(b), granted on the basis of statute or the common law, would continue to be paid from the judgment fund in accordance with Section 2412(c)(1) with the exception contained in Secton 2412(c)(2) for awards based on a finding of agency bad faith.

We recognize the intent of S.919 to require that agencies fund, from their own budgets, attorney fee awards resulting from proceedings in which the agency position was found not to be substantially justified. However, we note that by prohibiting

agencies from receiving funds specifically appropriated for payments of judgments under sections 504 and 2412(d), a situation may arise where, for example, a small agency with limited resources, against which a large attorney fee judgment is entered, may either be unable to pay the award or be forced to curtail services which it performs. Such a result could be contrary to the public interest. We believe the Act's goals would be preserved by retaining that portion of the bill which eliminates the judgment fund as a possible source of funding for 504 and 2412(d) awards, while permitting the appropriation of funds for payment of attorney fee awards. Undoubtedly an agency which was unable to pay such awards out of its current budget and which sought increased appropriations for payment of awards made because of assertion of unjustified positions would be placed in the position of explaining how its financial difficulties came to pass. Such a burden should discourage agency adherence to unjustified positions, while allowing the agency to pay its bills and fulfill its governmental responsibilities.

The bill does not adopt several suggestions made in my December testimony which we still feel would be improvements in this statute. These are:

1. Agency Review of Fee Awards Made by Adjudicative Officers

There appears to be uncertainty as to whether an agency may review an adjudicative officer's determination on the award of fees and other expenses under the Act. If an agency cannot review a fee award, the agency would always be bound by an adjudicative officer's fee determination because the Act only allows the party suing the government to appeal such a determinanation. We would suggest that the Act be clarified either by providing

that an agency may review an adjudicative officer's fee award, or by providing that the agency, too, may seek judicial review of the fee award determinations.

2. Meaning of the Term "Final Judgment"

It is unclear whether a "final judgment" occurs when the court enters an applicable order or when a party's right to appeal that order lapses. We favor the former interpretation. In order to resolve this question, we believe that a precise definition of the term "final judgment" should be included in the statute. This is important since the thirty-day deadline for filing the application is jurisdictional and cannot be waived by the government or even the court.

3. Interim Fee Awards

The statute permits the award of interim fees. It is not clear, however, whether the government is liable for these fees to the same extent as other parties or may not pay such fees until the provision of section 2414, which prohibits payment until all appellate action is completed or when the right to seek further review no longer exists, is satisfied. To further complicate this situation, the 9th Circuit has ruled that an interim fee order is not appealable.

In order to avoid the government's having to pay interim fees before the award of such fees can be appealed, consideration should be given either to prohibiting the award of such fees against the government altogether or to specifically authorizing appeals from interim fee awards at the time the award is made.

4. Challenges to the Constitutionality of Statute

Since agencies ordinarily have no option but to implement the laws enacted by Congress and since the Department of Justice similarly must defend the constitutionality of all statutes, it is at least inconsistent with the purpose of the Equal Access to Justice Act to even subject the government to the possible award of fees in such cases. An Equal Access to Justice Act exception for such cases should be considered.

5. Unreasonably High Fee Requests

In a number of cases, applicants for fees and expenses have sought amounts which have been, in our view, unreasonably high and, in some instances, grossly excessive. One way to deal with this problem is to include a provision requiring a court to deny all fees if it finds the initial amount sought to be unreasonably high or, perhaps, substantially unjustified. Indeed, some courts have recognized that the denial of all fees is an appropriate remedy for overreaching. See e.g. Brown v. Stackler 612 F^2 1057 (7th Cir. 1980).

6. Definition of Expenses

In the course of litigating fee petitions, several questions have arisen with respect to the term "expenses" as used in §2412(d). It is unclear whether the definition of "fees and other expenses", which may be awarded by the court in addition to costs, is meant to be all-inclusive or merely representative. If it is not all-inclusive, what expenses are permitted? We have

received many requests for payment of expenses which are not traditionally recoverable.

The bill would repeal the special provisions for payment of attorneys' fees in tax cases enacted by the Tax Equity and Fiscal Responsibility Act of 1982 as Section 7430 of the Internal Revenue Code. We are opposed to the repeal of these provisions, which have been in effect only since March 1st of this year.

Before the passage of TEFRA, attorneys' fees could not be recovered in tax cases filed in the Tax Court, where the vast majority of tax cases are litigated. Congress felt that this was an inequity and, thus, extended the right to recover such fees to Tax Court cases. In passing the attorneys' fees provisions of TEFRA, however, the Congress took note of the special problems faced by the Tax Court in applying any attorneys' fees statute. These problems relate both to the severe case backlog faced by the Tax Court, and to the rather special nature of Tax Court litigation, in which almost all cases are tried on stipulations of fact entered into by the parties. Congress met these concerns by requiring that taxpayers exhaust the administrative remedies available within the Internal Revenue Service as a condition precedent to seeking attorneys' fees in litigation, in order to eliminate any incentive for litigation in cases best settled administratively. It required a single adjudication of the fees issue in cases that could have been joined in a single proceeding to avoid delays occasioned by multiple litigation of similar issues. It avoided potentially time consuming litigation over facts not germane to the underlying tax dispute by eliminating any net worth requirement for the recovery of fees. Finally, it provided a simple and familiar standard based on a finding of unreasonableness for determining the Government's liability. This standard will permit the Tax Court to determine liability in

most cases based on the pleadings, the stipulations of fact, the findings of law, and the "paper record" of the case. It is thus tailored to the stipulation process which is the cornerstone of Tax Court practice.

The Equal Access to Justice Act contains none of these provisions designed to meet the Tax Court's concerns. Moreover, because taxpayers may "forum shop" in tax cases, it is extremely important that a unified provision apply to the recovery of attorneys' fees in all tax cases, lest the taxpayer's right to recover attorneys' fees turn on the forum in which the litigation was brought. For these reasons, the TEFRA provisions were correctly made applicable to all tax cases in any court of the United States, as well as the Tax Court. The bill now before the Committee is objectionable because it would scrap this carefully crafted law before it has been given any chance to function. The Treasury Department and Internal Revenue Service concur in the view that the TEFRA attorneys' fees provision, and not S.919, should govern tax cases.

Finally, the bill would repeal the sunset provisions of the Equal Access to Justice Act. While we support the continuation of this statute, we take no position at this time on the removal of the sunset provisions. It is worthwhile for the Congress to review the operation of this Act periodically, a review which is forced by the sunset provisions. On the other hand, normal oversight may accomplish the same goals.

We will be happy to work with the Subcommittee to explain further the changes we have suggested.

Thank you for the opportunity to appear before the Subcommittee.

Senator GRASSLEY. We now have a panel of four witnesses representing various interest groups.

Mr. William Allen is currently chairman of the administrative law section of the American Bar Association; Ms. Sally Douglas serves as assistant director of research for the NFIB; Mr. David Stewart is counsel for the Small Business Legal Defense Committee, and he is accompanied by Mr. Dale Nelson, president of Mid-Continent Small Business United and member of the board of directors of the U.S. Chamber of Commerce Small Business Council.

I'd like to add that Mr. Stewart is the author of an extensive handbook on the Equal Access to Justice Act which will be included without objection in the record.

Finally, Ms. Paralee White will testify on behalf of the Women's Association of Government Contractors.

I'm delighted to welcome such a distinguished panel, and please, before we go to your testimony, I would like to explain that with Mr. Allen is Reuben Robertson, formerly Chairman of the Administrative Conference, and currently in private law practice, and Mr. Andrew Singer, representing the tax section of ABA.

I would also like to point out that Mr. Nelson is not only president of Mid-Continent Small Business United, but he's a constituent of mine. He's been a leader in various small business movements within the United States, and a person that I counsel with quite often on small business matters.

I welcome you, Dale, not only as a member of the panel but as a friend. Please go ahead.

STATEMENT OF DALE NELSON, PRESIDENT, MID-CONTINENT SMALL BUSINESS UNITED, DES MOINES, IOWA, ACCOMPANIED BY DAVID O. STEWART, SPECIAL COUNSEL, SMALL BUSINESS LEGAL DEFENSE COMMITTEE

Mr. NELSON. Thank you, very much, Mr. Chairman. Thank you very much for inviting us here today to testify. As you've already stated, my name is Dale Nelson, and I'm a small businessman from Des Moines, Iowa, and I'm presently the president of Mid-Continent Small Business United which is a group of four States—Iowa, Nebraska, Missouri, and Kansas.

With me today is David Stewart, an attorney and special counsel to the Small Business Legal Defense Committee. We are here today representing 18 regional small business groups joined together, going under the name of Small Business United. Also, I happen to be a member of the Board of Directors of the U.S. Chamber's Small Business Council, and I'm here today representing their more than 230,000 small businesses belonging to the U.S. Chamber of Commerce. We are here today to express strong support of the small business community for the extension and the strengthening of the Equal Access to Justice Act as proposed in S. 919.

Mr. Chairman, I have been privileged to travel in the last year to 51 cities in the United States on behalf of small business, and I share with you and the committee today that the small business person in our country today is intimidated, he's frightened of his Government. They are troubled by the control over their businesses, their lives, that the Government exercises today. Most often

they do not understand how the Government works. Nor, how they can resist the Government action that takes place every day in their lives.

The Equal Access to Justice Act provides one vital tool for helping the small business person in the United States today to deal with the Government. It gives the small businessman and lady a fighting chance when he gets snarled up with the Government. We commend the sponsors of S. 919 for acting to preserve that fighting chance of the small business person.

Mr. Stewart, who is here with me today, has conducted a substantial review of the experience under the Equal Access to Justice Act, and will now please speak more particularly to some of the questions raised in connection with S. 919.

Senator GRASSLEY. Dale, let me assure you as a person who travels to National Airport often, that if you have a plane at 4:20, you should leave right now.

Mr. NELSON. I might also tell you that it's snowing in Des Moines, Iowa.

Senator GRASSLEY. I'd appreciate some good news.

Mr. NELSON. Thank you, very much, Senator.

Senator GRASSLEY. Mr. Stewart, and then we'll go to Mr. Allen.

Mr. STEWART. Thank you, very much, Mr. Chairman. We think it's an appropriate time now, halfway through the alloted life of the Equal Access Act to take stock of where it stands. To that end we conducted this study that is incorporated in this handbook that you referred to earlier.

In preparing that study, we were able to discern two major trends. The first is that for now the Equal Access to Justice Act is a promise unfulfilled, in our view, due largely to ignorance of the statute among the public and among attorneys. Utilization of the law has been very low. It's been suggested here today that that low utilization is the result of such excellent administration as now takes place here in Washington. I can't dispute that directly. I can enter my lack of conviction that that is the case.

If I can just tell a small anecdote, I was recently approached by a very high-powered Washington lawyer who had a good claim under the Equal Access Act but had missed the 30-day deadline, and he was trying to find out if there was some way around it. Well, there wasn't. And I think he's one of many lawyers around the country who are just simply missing the boat on the Equal Access Act.

The second trend we've discerned is that the executive branch has consistently resisted effective implementation of the statute. This resistance has taken several forms.

The Government has presented arguments in court that we think are directly contrary to the legislative history and the plain terms of the statute. Mr. Chairman, you've already referred to a couple of those today. Second, the record of the administrative agencies in making one fee award in the first 15 months under this statute is one that yields only one conclusion: that they are actively resisting making such awards. Finally, it's also been covered today that there have been substantial delays in making payments once awards are finally secured.

On the specific issues raised by S. 919, I would like to respond to just a couple. First, we strongly support the proposal to include

payment of fees from the agency budgets, not from general funds. We think that sharpens the deterrent and incentive effects of the statute. We're concerned that that would only increase the current delays in payments, though. It would give the agencies a greater incentive to delay payment, since payment would be coming out of their own hide. Consequently, we think that 60-day period that's been discussed here today—within which payment must be made—is very important and becomes more important when you require payment from the agencies' budgets.

Second, because we are so concerned that there is a big public education job to be done on the Equal Access Act, we would propose that all orders of both courts and agencies that are subject to the act include a legend which could be printed or stamped on that would state briefly and succinctly that a prevailing private party may be able to recover fees under the Equal Access to Justice Act. That would get the word out to the client and to the lawyer that it's time to look around and see if maybe there is a chance to recover those fees.

Third, we would urge the Congress to address the very difficult problem of controlling agencies in their own awards of fees. The current judicial review provision for agency decisions is very, very relaxed. The private party needs to seek permission to appeal to a court; permission is not routinely granted. And then the review that does take place, even if he gets review, is under a very relaxed standard: abuse of discretion. We would propose strengthening that standard to allow the court to conduct a de novo review on the basis of the record made before the agency.

In addition, we would propose, in effect, a double damages provision that if the agency's decision denying fees is reversed by the courts, the courts can double the fees that are awarded to the private party. Those changes would get two messages to the agencies: One is that Congress is serious about this law and wants it enforced. The second is that if the agency, perhaps unconsciously, shades a decision on a fee award, cognizant of its impact on its budget, it will also know that if a court reverses the denial of fees the impact on its budget will be even greater.

Now, the other points I want to address briefly involve the substantive areas of coverage of the statute: Tax cases and boards of contract appeals.

We strongly support the proposal in S. 919 to repeal the TEFRA provisions, section 7430 of the Internal Revenue Code. We think the way that provision is currently written sharply prejudices the rights of private parties. It does so in three ways: It shifts the burden of proof, as you have already noted today, Mr. Chairman, and any trial lawyer worth his salt will tell you the burden of proof is very frequently the difference between winning and losing.

Second, it limits the fee award decision to consideration of the position taken by the Government in the civil proceeding. So the underlying agency action is not subject to the scrutiny of the court in deciding whether to make a fee award. Now, that is directly contrary to the Equal Access Act's provisions which refer to the "position of the United States" in both administrative and court actions. Thus, by narrowing the focus of the fee award decision, TEFRA

sharply reduces the amount of review of irrational and unreasonable agency action. That's what we're trying to control.

Third, the ceiling on fees imposed by the TEFRA statute, $25,000, is both arbitrary and not justified by any particular policy.

The Boards of Contract Appeals question is a very important issue to many small businesses, as are tax cases. Those are the kinds of cases that small businesses come up against. We think that since Government contractors will be able to get fees in claims court cases, but not in boards of contract appeals, you're creating an irrational situation that just can't be justified.

I would also note, to go back for a second to tax cases, that we do think the Tax Court cases can be covered by the Equal Access Act without creating any additional problems.

It is our reading of the statute that those proceedings are covered by the statute. The Tax Court has held otherwise. We would urge Congress to amend the law to squarely cover that court.

As just a general conclusion, I would note that when this legislation was first proposed, the opposition was very strong, and it was somewhat apocalyptic. It predicted that hundreds of millions of dollars of fees would be awarded every year and, chaos in the Government. We know neither of those predictions took place.

Now, the opposition is getting a little more sophisticated. Now, instead of frontally attacking the statute, they are coming at it sideways. Take away the boards of contract appeals. Take away the tax cases. Now, the Justice Department wants to take away constitutional cases. They're trying to gut the statute from the side door. We would urge this subcommittee and the Congress to resist that, to continue to support the Equal Access Act. The continuation and strengthening of the Equal Access Act is very high priority to small businesses.

Thank you, Mr. Chairman.

Senator GRASSLEY. Thank you. As with all the witnesses today, your complete prepared statement will be entered in its entirety in the record.

Mr. Allen?

STATEMENT OF WILLIAM ALLEN, CHAIRMAN, ADMINISTRATIVE LAW SECTION, ACCOMPANIED BY REUBEN B. ROBERTSON, COMMITTEE ON PUBLIC ADVOCATES AND PUBLIC REPRESENTATION, ADMINISTRATIVE LAW SECTION, AND ANDREW SINGER, TAX SECTION, AMERICAN BAR ASSOCIATION

Mr. ALLEN. Thank you, Mr. Chairman. We are, indeed, grateful for this opportunity to present the views of the American Bar Association on the reauthorization of the Equal Access to Justice Act.

The ABA favors that reauthorization. It supports the Equal Access to Justice Act. The ABA's support of the legislation is rooted in resolutions that were adopted by the house of delegates, the policymaking body of the ABA, in 1977 and 1978. And in particular the 1978 resolution which is specific in proposing that there be legislation that provides for fee awards to private parties in certain circumstances when they are litigating against the Government.

The Equal Access to Justice Act is perhaps not quite the shape of the legislation that the ABA resolution contemplated, but it is close to it. Among other things, it calls for consideration of the fact that the economic interest of a party is small in comparison to the cost of effective participation or the party does not have sufficient resources or adequately compensate counsel. We take it that this is the burden of that aspect of the Equal Access to Justice Act that limits the parties who are able to secure fee awards from the Government.

In any event, I think it is fair to say that, since the enactment of the Equal Access to Justice Act, the ABA has embraced it and its principles. We have been concerned. A number of the bodies of the ABA—including my section of administrative law—the section on public contract law, and the section on taxation have all been concerned with various aspects of the underlying legislation and the administration of the legislation since then.

In particular, there have been two further resolutions that have been acted on by governing bodies of the ABA. Three, indeed, but two of particular relevance to the reauthorization bill. One of those, adopted by the house of delegates in 1982, calls for certain amendments to the Equal Access to Justice Act and opposes some other kinds of amendments to that act. And we are very happy to see that S. 919 coincides with a number of the ABA recommendations for amendment. For example: the provision that fee award should be paid by the agency involved; the correction of eligibility standards to make them conform in both court cases and administrative agency cases; the provision that awards may be made against agencies that participate in proceedings before other agencies.

A resolution adopted about this same time, in 1982, at the instance of the public contracts law section, adopted by the board of governors—which is authorized to act for the ABA between meetings of the house of delegates—recommends that the statute be amended to include proceedings before agency boards of contract appeals. I have heard the testimony here this afternoon on that point. I cannot understand any reason in policy for omitting that very important category of formal administrative agency adjudications from the Equal Access to Justice Act.

A third resolution that the ABA has adopted, concerning the administration of the Equal Access to Justice Act, relates to the preservation of the confidentiality of the net worth information that people and businesses may have to submit in support of a fee award.

It's addressed to agencies, certain agencies that we think have not made appropriate provision for allowing people to protect the confidentiality of that information. We have suggested in our prepared statement that this subcommittee and the other bodies of Congress that look at the act may wish to consider this and, through language in the committee report, or perhaps even in legislation, give the agencies a nudge to insure that at least the person has the opportunity to protest against that kind of information that may be very, very sensitive, either for personal reasons or for business reasons, being made public willy nilly.

And I finally come to the last point I'll cover orally. I will ask that our prepared written statement be received in the record as if read, if that is agreeable.

Senator GRASSLEY. Without objection so ordered.

Mr. ALLEN. The last point I wanted to cover orally is the matter of the tax cases. The ABA has no position on whether the tax cases should be covered by the general statute or, as they now are, by the TEFRA statute. We do have a position that the proceedings in the Tax Court should be covered by the fee shifting provision, wherever that fee shifting position is. And, at least it can be said that the present legislation, lodging the tax cases separately under TEFRA, does accomplish that part of what the ABA has called for.

And, of course, Mr. Chairman, I was heartened by your comment, the comment with which you opened this hearing. That this subcommittee would not think of eliminating the provision for recovery of fees in Tax Court cases. We do strongly urge that, if, indeed, tax cases are shifted back to the Equal Access to Justice Act, Tax Court cases be specifically covered.

And that concludes my oral presentation. I thank you, Mr. Chairman.

Senator GRASSLEY. Thank you, Mr. Allen. As I said, your statement is a part of the record. Ms. Douglas.

STATEMENT OF SALLY DOUGLAS, NATIONAL FEDERATION OF INDEPENDENT BUSINESS

Ms. DOUGLAS. Thank you, Mr. Chairman. I am going to summarize my statement very quickly and bring out the most important points.

We are very happy to see this subcommittee holding hearings on reauthorization of Equal Access to Justice. It is one of our top priorities. It always has been; it always will remain a top priority with NFIB members and the small business community at large. We are in general support of S. 919, the intent behind that. I would like to make a comment on a couple of items, one of which has to do with this whole problem of the section 292 and TEFRA and what it accomplishes or doesn't accomplish.

I think that without question we support the intent to provide for some sort of fee recovery for tax cases in the Tax Court, but I do not believe that that particular provision cannot become an amendment to the organic statute of Equal Access to Justice. I remain unconvinced that IRS needs special treatment, and that's, I think, what the appearance of this section is to most small business people, that they are once again coming up against IRS and IRS is receiving some sort of more favorable treatment than other agencies.

Senator GRASSLEY. That's consistent with your testimony before my subcommittee.

Ms. DOUGLAS. In December.

Senator GRASSLEY. Didn't you also give similar testimony before my IRS Subcommittee of Finance.

Ms. DOUGLAS. That's true.

Senator GRASSLEY. Please go ahead.

Ms. DOUGLAS. The most objectionable element in the section under TEFRA is the shifting of the burden of proof. That is the whole basis upon which Equal Access to Justice rests, and it is, it just seems to be commonsense that the Government is in a much better position to prove their actions were reasonable, vis-a-vis the small businessman trying to prove that they were unreasonable.

Again, we don't see any reason to treat Tax Court cases differently in terms of burden of proof provisions. We would urge you to consider amending the Equal Access to Justice Act so that IRS is clearly and completely covered under Equal Access to Justice, under the same standards that every other agency is.

And along with that, I am pleased to see attention finally being drawn to the problem of the board of contract appeals decisions. We, and I think many other people who originally supported the act, simply assumed that these kinds of cases were being covered under Equal Access. There is, apparently, a problem. I think it's a simple matter to take care of, if there is positive statutory language within the act that says that these cases do come under the purview of Equal Access to Justice.

Senator GRASSLEY. Thank you. Your complete statement will be entered in the record. Ms. White?

STATEMENT OF PARALEE WHITE, WOMEN'S ASSOCIATION OF GOVERNMENT CONTRACTORS

Ms. WHITE. Thank you, Mr. Chairman. My name is Paralee White. I am vice president of the National Association of Women Government Contractors. I am also a private practitioner in Washington. Most of my clients are small businesses. The members of NAWGC are primarily women owned businesses, most of which are small and very small businesses.

I want to thank you for letting us testify today. Our concerns are primarily directed at the problems the act creates businesses that are involved in disputes with the government as a result of contractual matters.

ENLARGED COVERAGE URGED

The first problem we have is the fact that the act doesn't cover the boards of contract appeals. In a recent decision, *Fidelity Construction,* the court of appeals for the Federal circuit held that the boards of contract appeals did not have the authority to award fees because it was not explicitly stated in the act.

My personal experience is that the boards of contract appeals offer a better forum for the small businesses. The hearings are less formal and the small businesses perceive the boards of contract appeals as a place where they can get more equitable treatment. I would hate to see the act—and this is how the act is currently being interpreted—exclude the board as an option for small businesses.

Also, in most contracts, the Contract Disputes Act of 1978, the business is given the option of choosing a forum of the Boards of Contract Appeals or the Claims Court. In conclusion, as our first suggestion, we would propose that the act be modified to provide for explicit coverage of the boards of contract appeals.

GOVERNMENT POSITION SHOULD BE CLARIFIED

Our second problem with the act as it's currently being interpreted is with the issue of whether the Government's position was substantially justified. Although there are cases involving this issue that are currently in litigation, one of the positions being taken is that the only position referred to in the act is the litigation posture of the Government.

We feel that this eliminates very deserving cases from receiving an award of attorneys fees. Many times the Government can act very unreasonably in a prelitigation posture by refusing to negotiate with the small business, or by requiring extensive amounts of documentation of the claim before it will render a final decision. The small business at this point is forced to hire an attorney in order to negotiate the claim. However, according to some interpretations, these attorney fees would not be considered in deciding whether the Government's position was substantially justified because only the Government's position in litigation is evaluated.

We suggest that the act be modified to provide that, when referring to the position of the United States, it refers to the position of the United States from the initiation of the dispute, not just the Government's litigation posture.

Senator GRASSLEY. Is that your testimony? Thank you very much. And your complete statement will be entered into the record in its entirety.

I'll begin with Mr. Allen. But let me suggest to you that anybody who is on the panel who wants to respond to any of these questions, please do.

In regard to your endorsement of the bill's provisions which speak to the question of who pays the award when more than one agency is involved in the proceeding, what form do you see the court's deliberation in making that allocation taken? In other words, would the judge simply make the allocation based upon the record, or could we evolve into an extended proceeding in which the agencies attempt to pass the blame to one other, perhaps even raising knotty questions of executive privilege?

Mr. ALLEN. I will tell you truthfully, Mr. Chairman, I have not thought about that aspect of it.

Senator GRASSLEY. Why don't we invite you to think about it, and then respond in writing?

Mr. ALLEN. Surely. I would be pleased to do so.

[Subsequent to the hearing the subcommittee received the following information:]

I do not conceive that there would be any protracted separate proceeding. Rather, the decision which of two or more agencies is responsible for satisfying the fee award would be made on the record of the underlying proceeding. Indeed, it seems unlikely that there would be many such cases that a court would be called upon to decide. It is only in a rare judicial proceeding involving the United States that the responsible agency is not readily identifiable. Thus, I do not envision the kind of problem suggested by your question. That, I think, is all that need be said about the proposed amendment to 28 U.S.C. § 2412.

The suggested amendment to 5 U.S.C. § 504(d)(1) would have somewhat more application. The example given in my written statement is that of the Occupational Safety and Health Administration prosecuting enforcement proceedings before the Occupational Safety and Health Review Commission. Even in such cases, if the private party prevailed before OSHRC, it would be quite clear, without the need for

any additional proceeding, that OSHA was responsible for prosecuting the case and therefore liable for any fee award.

As indicated in my prepared statement, the provision of S. 919 that deals with agency adjudicative cases—such as the OSHA-OSHRC case that I use as an example—seems technically defective. The relevant sentence is the same as in the proposed amendment to 28 U.S.C. § 2412(d)(1); it therefore speaks of "the court" making the decision which agency should pay the fee. There would be no court involvement in a section 504(d)(1) case.

There would be no doubt that, amended to correct the reference to "the court," a sentence such as is set forth in S. 919 would adequately carry out the intention to deal with the case in which two or more agencies are involved. You may wish to consider, however, whether a rather more elaborate amendment for this purpose would be desirable. Section 504(a)(1) seems to contemplate only the case of a single "*agency* that conducts an adversary adjudication," which is to award fees unless the adjudicative officer "finds that the position of *the agency* as a party to the proceeding was substantially justified. . . . " (Emphasis added.) The rest of Section 504 is consistent in apparently dealing in terms solely with the case prosecuted and determined by a single agency and not with the OSHA-OSHRC kind of case. It may be desirable to harmonize the section as a whole.

Senator GRASSLEY. I would like to go back to a point you made in your testimony.

In October 1981, John Noland who was chairman of the section on taxation of the ABA testified in regard to attorneys fees in tax cases, and I quote, "the term unreasonable is too vague a standard, and the burden of proof in any case should be on the Government, not the taxpayer."

Does this still represent the position of the ABA?

Mr. ALLEN. Yes. I would not have any quarrel with that position. I think it is quite consistent with the ABA's position, yes.

Mr. Singer, who represents the tax section, may have a comment.

Mr. SINGER. I appeared with Mr. Noland at that hearing. And that was and is our position. We submitted in our statement to the subcommittee a number of suggestions as to specific examples that might be given in the legislative history to give some substance to the term unreasonable. I think as has been mentioned earlier in the hearings, there really is no good specific standard that we've been able to figure out to put in the statute. I think the best that can be hoped for is that Congress would give some guidance in its legislative history as to what the term means.

There were some specific examples stated in the legislative history of TEFRA. Unfortunately, I think one of the examples was that the Government is not acting unreasonably when it litigates the same issue in number of circuits, which I think is precisely the wrong answer, not the one we were looking for, certainly.

I think what we were trying to say is that Congress ought to give some more guidance, either in the statute or the legislative history as to what it has in mind, and there are certain recurring situations such as looking for a conflict among the circuits that arise in tax litigation, and we would like some guidance on that. We think it would be helpful.

Senator GRASSLEY. Well, let me go at the question from this point, Mr. Singer, is there any justification for treating tax cases differently depending which forum is involved?

Mr. SINGER. Well, there is a reason, in my judgment, to treat tax cases differently, and that was also alluded to earlier, and that is the volume of tax litigation compared to other types of cases.

Senator GRASSLEY. I want to refer just to tax cases as a class. Is there any reason to treat them different in the Tax Court as opposed to the district court or the Court of Claims?

Mr. SINGER. We do not think that tax cases in the Tax Court should be treated differently than tax cases in the district courts or the Claims Court.

Senator GRASSLEY. Should tax cases, as a class, be treated from different types of cases.

Mr. SINGER. We are concerned, as the tax bar, about the backlog of cases in the Tax Court. It impairs, we think, the quality of the judgments that we get, and most importantly, it delays substantially the time when we can get a decision in a tax case. And I don't think that's in anybody's interests, and in particular, the interests of the small businessman who's got this liability hanging over his head. I don't think it's in his interest to have to wait 2 or 3 years until the Tax Court gets through its 50,000 cases before it gets to his case.

We are concerned, although we clearly support, and have long supported the idea of attorneys fees for taxpayers who prevail in appropriate circumstances. We are concerned that this not be made the subject of a prolonged hearing that is going to just further complicate an already almost unbearable situation, that we have with the Tax Court. So we think there are some special circumstances. In addition, the TEFRA rules address some special problems in tax litigation which are not picked up in the Equal Access to Justice Act. For example, there is a provision in the TEFRA rule that requires taxpayers to exhaust their administrative remedies before they are able to seek attorneys fees.

We don't think that a taxpayer should be able to skip the administrative proceedings that are provided for settlements with the Internal Revenue Service.

Senator GRASSLEY. Well, that was a change we made in TEFRA.

Mr. SINGER. That's right, and we suggested it. But that is something that would not be in the Equal Access to Justice Act. There are also, in tax cases, unlike most other litigation, there are cases where it's difficult to tell who the prevailing taxpayer is.

For example, there may be two issues in a case, one of which involves a substantial amount of money; another issue involves much less money, but is more important to the taxpayer because of the precedential effects. The TEFRA rule takes that into account and says you may be a prevailing taxpayer even though you lost on the dollars and cents, and it directs the judge to look at those kinds of issues.

These are all special things that, additional reasons why we're satisfied with the TEFRA rule, at least as a beginning, and I guess our position is identical really to the position expressed by Senator Baucus earlier, that we think this is a good start, and it ought to be given a chance, and if you can improve it, great. But I wouldn't—we would not support a repeal of that provision.

Mr. STEWART. Mr. Chairman, if I could respond to that question.

Senator GRASSLEY. Yes. You are all invited to.

Mr. STEWART. I am troubled by a couple of remarks. One is the idea that somehow if you have multiple issues in an equal access case and you prevail on only a few, that you cannot recover fees for

those issues on which you prevail. The statute is quite clear on that point, that you can prevail and recover fees for just some of the issues, and the courts have been quite clear on that. So in that respect, the statute is identical to TEFRA.

Now, the question of covering the backlog in Tax Court. It has been suggested today that it is important not to have the Tax Court get bogged down in extra proceedings. I am, of course, sympathetic to that. But the equal access procedure, and I've been through it a couple of times for clients, is really very fast. You just file a pleading, the other side files a pleading. It's the same as the proceeding under TEFRA. It is certainly no more onerous and no more likely than section 7430 of TEFRA to create a backlog.

A final point is the statistical one. We have very incomplete statistics, but the statistics compiled by the Judicial Conference showed that out of the first 30 fee applications that were filed in courts, only 13 were granted. Out of the first six fee applications that were filed in tax cases, five were granted. That suggests that the abuses by the IRS are much more, and much worse. And consequently, Congress should be very careful to provide very effective remedies for private parties there.

Mr. SINGER. I had not heard that statistic, but if it is true, I don't see what people are worried about. If five of the six applications were granted, then apparently taxpayers are not doing badly in the Tax Court at all.

Mr. STEWART. That was, of course, before TEFRA took effect.

Senator GRASSLEY. My next question is for Paralee White. You indicated in your statement that the Claims Court is covered under equal access. Do you feel legislative clarification is necessary as a result of the *Fidelity Construction* case?

Ms. WHITE. Well, the Claims Court isn't explicitly covered. The Court of Claims prior to the change as of October 1, 1983, is covered. The Claims Court is not explicitly covered, and we would agree that that needs to be clarified.

The Boards of Contract Appeals question litigated in *Fidelity Construction.* We had three boards, Agricultural, Postal Service, and the ASBCA hold that they can award fees. In *Fidelity* the court held that they can't.

I think it would simplify things a great deal and make it much more fair to small businesses if the act was clarified to state that the Boards of Contract Appeals are covered.

Mr. ALLEN. Mr. Chairman, may I say——

Senator GRASSLEY. Yes.

Mr. ALLEN. I learned during the preparation of this statement that there are decisions of the Claims Court now that it is, indeed, entitled to award fees. I read those opinions. I would have to say that the Government's theory in opposition to the awards by the Claims Court seems very, very tenuous, and it is hard for me to believe that under the present statute the Claims Court would not be sustained in awarding fees. These are all since the first of the year, the opinions that I referred to.

Senator GRASSLEY. Now, to Sally Douglas. Do you know if your members have experienced difficulty in receiving timely payments once an award has been granted? And do you have any suggestion on ways to improve the situation if it's bad?

Ms. DOUGLAS. To my knowledge, Mr. Chairman, none of our members have actually received money in hand under the Equal Access to Justice Act yet. As a matter of fact, I don't know of anybody who has.

Let me say that there is one problem that our membership is experiencing that we are trying to help them with, and that is the 30-day filing deadline. A lot of them are missing it. And we're trying to indicate to them the importance of that because if that's the only thing that's stopping them, it should be a very easy matter to rectify.

Senator GRASSLEY. We're looking at that 30-day situation. Right now we don't have a different position. Go ahead, Mr. Stewart.

Mr. STEWART. Mr. Chairman, just on the award question, I did attempt an informal survey of attorneys who had succeeded in winning fees to find out how bad the delays were, or in fact if there were any. This is not statistically sound as a survey. I contacted nine attorneys; five of them had won fees, but had been tied up on appeal by the Government, which suggests that the Government's appeal rate is somewhat higher than what Mr. McGrath suggested earlier today.

In addition, of the four who have gotten payments, their payments were delayed anywhere from 4 to 8 months. So, that's 120 days minimum up to 240 days.

Senator GRASSLEY. Ms. Douglas, you indicate in your testimony that you support the provisions of the bill relating to the funding of fee awards. Would NFIB object to a provision which would allow agencies to come forward at the end of a fiscal year for a supplemental appropriation in the case of a small agency which has been hit particularly hard by fee awards. Would this system sufficiently guard against unwarranted agency activity if such a change were made?

Ms. DOUGLAS. I'm not trying to dodge your answer, but I'm not sure precisely how NFIB would feel about that.

But, let me say that I think the important elements there are keeping the agencies accountable, and if, through the process of having them come up for a supplemental appropriation, having to justify the reasons why they need it, and having vigorous oversight by Congress, if that keeps them accountable, I think we could probably live with that in some cases.

Although I would—I believe we would not be too happy to see that become a matter of course.

Senator GRASSLEY. Let me suggest to you that in regard to that question, if you have a different view, to write that to us at a later date.

Mr. Stewart, I have a couple points I would like to bring up to you or anybody else that wishes to comment.

The Justice Department advocates an exception for the Government under this act when the Department is required to defend the constitutionality of a statute. What is your view on that? Do you concur with it?

Mr. STEWART. Mr. Chairman, we don't. We don't think it is going to come up a whole lot. Mr. McGrath couldn't cite an instance where it had come up. In addition to the case you pointed out, which was the congressional veto case, where the Justice Depart-

ment did not defend the constitutionality of the statute, there's currently a case before the Supreme Court now where the Justice Department declined to defend the constitutionality of a provision of the Federal Communications Act. That was Attorney General Civiletti. The current administration took a different view, but Attorney General Civiletti refused to defend the statute.

Obviously I think the Justice Department is not in such an inflexible position as they might have suggested here, and we see no need for this particular exemption.

Senator GRASSLEY. Was Attorney General Civiletti's position based upon executive prerogative?

Mr. STEWART. Not to my knowledge. My understanding was that he said he did not think a reasonable constitutional defense could be offered for that particular provision.

Senator GRASSLEY. Could you expand on your testimony relating to the treatment of tax cases? How important is the burden of proof in cases? Is there a substantial difference in the standards under the Equal Access Act and TEFRA?

Mr. STEWART. Well, as I said earlier, I do think there is a substantial difference. The burden of proof in a close case can be dispositive; it often is dispositive. The burden of going forward, obviously, is much easier to place on the Government, as has been said here earlier; they are the people with access to the information. The small businessman does not have that kind of access.

We think that's a very material point. And to those who suggest it isn't, we would also point out that plainly the IRS thought it was material enough to get it shifted back on to the private party in TEFRA. We think it's significant enough to get it shifted back to the Government.

I would also say I was very interested in Senator DeConcini's remarks that it had been his understanding initially that the substantial justification test was meant to be tougher than the courts have interpreted it.

I think that's very important for this subcommittee and the Congress to keep in mind, and obviously you can write on a clean slate here, but it creates an additional concern that private parties are not getting the kind of protection that was initially intended by Congress.

Senator GRASSLEY. Hopefully we can overcome that. Hopefully we would have judges that would look at congressional intent. And hopefully, where there is no case law, develop that case law to follow congressional intent. I would hope that they would make a good faith effort to do that.

Mr. STEWART. In reading the cases, I think the courts have tried. I would state, as we said in our statement, we don't believe the Department of Justice has been very helpful on that point. We think they have in large respect misrepresented the legislative history.

Senator GRASSLEY. Thank you, Mr. Stewart. That is my last question. Does anyone have any final comments they wish to make?

Mr. SINGER. If you're going to be considering improvements to TEFRA, as opposed to repealing it, there was an unfortunate statement, or I think it's been interpreted unfortunately, about appeals of adverse decisions on fee awards.

It is suggested in the legislative history that if you win in the Tax Court and lose on your attorneys fee award, you cannot appeal. Because, you have to appeal, you have to have something to appeal in the substantive issue before you can appeal on attorneys fee awards. And if you won everything on the substantive issues, you cannot appeal, even though you lost on the attorneys fee awards.

I would hope that if you're going to do something in this area that it be made clear that the taxpayer has the right to appeal a denial of a request for attorneys fees, even though, particularly if he won everything below.

Senator GRASSLEY. I wasn't aware of that, and I'm glad to have that suggestion. We will consider it.

Mr. SINGER. Thank you.

Mr. STEWART. Mr. Chairman, if I could offer just one last idea? I am impressed by Ms. White's suggestion concerning the prelitigation position of the government, the question of whether fees should be awarded if that prelitigation position is not substantially justified.

I think it's clear the statute provides that. A very important decision by the Third Circuit Court of Appeals just came down: The *Natural Resources Defense Council* v. *Environmental Protection Agency,* holding that way. Other courts have not held that way.

We think that is a question—although we did not address it in our prepared testimony today—that the subcommittee might well want to take a look at, and strengthen the provisions of the act on that matter.

Senator GRASSLEY. Thank you all very much. You have been a very interesting panel and made a real contribution to our discussion.

[The submitted statements and additional material follow:]

PREPARED STATEMENT OF DALE NELSON AND DAVID O. STEWART

The Equal Access to Justice Act (EAJA) represents an historic and innovative step toward making government both fair and effective. By reimbursing the fees and costs of small businesses and individuals of modest means, the Act allows such parties to resist unreasonable government action even though the government's litigation resources are so much larger than their own. In addition, the Act seeks to deter unreasonable government actions by allowing fee awards to those who successfully resist such actions.

But, as the sponsors of S. 919 have recognized, merely enacting the EAJA as a three-year experiment is not enough. It is vital that, with revisions based on the experience under the statute, the experiment be made permanent. Indeed, the effort to modify and extend the EAJA beyond its expiration date is every bit as important as the initial enactment.

We strongly support the extension of the EAJA. When the law was first proposed, some cried in anguish that the cost would be monumental -- hundreds of millions of dollars a year according to the Justice Department -- and that the stately pace of government would be slowed even further as government workers fretted over the prospect that their actions might leave the government liable to a fee award under the EAJA. Not surprisingly, those dire predictions have been proved false. Fees awarded under the EAJA during its first year were less than $1 million, and there has been no indication of any greater paralysis of the federal government due to the EAJA. Consequently, the case against the EAJA has evaporated.

As supporters of the Act, however, we wish to highlight two disturbing trends.

First, the statute has not been used by small businesses and individuals anywhere near as often as it should have been. The Congressional Budget Office estimated in 1980

that the Government loses 12,000 civil lawsuits a year in federal court. Yet in the first nine months under the statute, only 30 EAJA fee applications were filed in federal courts. Thirty fee applications -- of which seventeen were unsuccessful -- are hardly likely to cause the improvement in government enforcement decisions that Congress sought when it enacted the EAJA.

We believe the under-enforcement of the EAJA results largely from ignorance of the Act among the public and within the bar. The Small Business Legal Defense Committee has prepared a handbook for attorneys on the statute, which we are submitting to this Subcommittee with this statement. A determined educational campaign is needed to ensure diligent enforcement of the EAJA.

Second, the executive branch, perhaps not unexpectedly, has been a substantial obstacle to effective implementation of the statute. Its obstructions have taken three general forms.

1. Government lawyers have pressed on the courts a number of legal theories that proceed, at best, in questionable good faith. An example is the definition of the term "substantial justification" under the EAJA. The Justice Department urged Congress in 1980 to allow fee awards only if the government's action was "arbitrary, frivolous, unreasonable or groundless." Congress squarely rejected that standard, calling it "too restrictive," and adopted the substantial justification test. Despite that unequivocal rejection of its position, the government has argued repeatedly in the courts that substantial justification in the Act really means actions that are not "arbitrary, frivolous, unreasonable or groundless."

A similar pattern has emerged in social security cases. The legislative history of the EAJA is clear that, even though administrative cases involving social security claims are not covered by the statute, court cases concerning those issues are covered. Yet the government continues to urge courts to find that the EAJA does not apply to court cases involving social security issues.

2. The award of EAJA fees in administrative proceedings is virtually non-existent. In the first 12 months under the statute, 108 EAJA fee applications were filed in agency proceedings, but no fees were awarded. As the Armed Services Board of Contract Appeals noted on a related matter in its Brand S. Roofing decision, such decisions "may [be] based more on a desire to conserve funds than on a definitive interpretation" of the EAJA.

3. In the few cases in which fees have been awarded under the EAJA, actual payment of the fees has been delayed unreasonably. Assistant Attorney General McGrath testified last December that in one instance the private party secured payment of his fee award only after the court threatened to hold the Attorney General in contempt if payment was not promptly made.

Despite the problems arising under the statute, we vigorously endorse its proposed extension. We would add the following comments and suggestions on S. 919.

A. Payment of fee awards -- We support the proposal in S. 919 that EAJA awards be paid out of the budget of the agency involved in the litigation. That provision should sharpen the EAJA's impact on each agency, and thereby enhance the statute's deterrent effect on unreasonable government action. We are concerned, however, that such a provision may increase the existing delays in payment of EAJA fee awards. Surely the incentive to delay payment will increase if the fees come directly out of the adversary's budget. Accordingly, we propose that the responsible agencies be given sixty days in which to make payment following the entry of a final fee award order.

B. Notice -- To make the EAJA more effective, greater enforcement is needed. We recommend that a brief statement be stamped on judicial and administrative orders to which the EAJA could apply (in other words, civil adversarial actions involving the government), advising the private party and his counsel that EAJA fees may be available to a prevailing private party.

C. Agency Proceedings -- We also ask this Subcommittee to review the serious problem of winning fee awards in agency proceedings. Congress should consider revising Section 504(c)(2) of Title 5 to make clear that the EAJA must be fully enforced in administrative actions, as in court cases. That section now requires an unsuccessful fee claimant to petition the courts for leave to appeal from denials of fee awards in agency cases. Until the agencies demonstrate that they, like the courts, will fairly enforce the EAJA, private fee applicants should have the right to appeal an agency's fee decision to the courts for review de novo.

An alternative approach would impose a penalty -- in the form of a double fee award -- whenever a fee application is denied by the agency but the courts reverse that denial. That approach quickly would make clear to the agencies that favoring the government on fee applications will carry a heavy cost.

D. Tax Cases -- We support the proposal in S. 919 to repeal Section 7430 of the Internal Revenue Code, which was enacted last fall as part of the Tax Equity and Fiscal Responsibility Act of 1982. Section 7430 only confuses the entire area of fee awards from the government by establishing different substantive standards for tax cases. Moreover, Section 7430 improperly places on the private party the burden of demonstrating that the government's position was not substantially justified.

In repealing Section 7430, however, this Subcommittee must provide for the application of the EAJA in the Tax Court. Without such action, under current court rulings private parties could win EAJA fees in tax disputes in any forum except the Tax Court. The statute should apply equally to all similar cases.

E. Boards of Contract Appeals -- A similar problem has arisen in connection with the Boards of Contract Appeals (BCAs). A recent Court of Appeals decision holds that the EAJA does not apply to BCA proceedings, even though the law does apply

to parallel proceedings in the U.S. Claims Court. There can be no justification for allowing fee awards if a claim is brought in one forum, but not if the identical claim is pressed in an alternative forum.

In sum, the Equal Access to Justice Act incorporates a wise and balanced approach to the problem of curbing unfair and unreasonable government action. We commend the sponsors of S. 919 for recognizing that the Act should progress beyond the experimental stage and should be extended as a permanent and even more effective statute.

THE EQUAL ACCESS TO JUSTICE ACT:

An Attorney's Handbook©

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I. Introduction

The Equal Access to Justice Act ("EAJA") permits individuals, small businesses, and non-profit organizations to recover attorney fees when they prevail in certain adversary contests against the federal government in which the government's position was "not substantially justified." 1/ The Act, which covers both court and administrative proceedings but does not reach ordinary tort actions, was designed to serve two central purposes. First, Congress was concerned that some parties "may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved . . . ." 2/ By allowing the award of fees to litigants with limited resources, Congress hoped to "plac[e] the Federal government and civil litigants on a completely equal footing." 3/ Second, legislators expressed the hope that the statute would "make the bureaucracy more accountable in the exercise of its regulatory powers and more responsive to the needs of citizens." 4/

Some of Congress's high expectations were reflected in the cost estimates that accompanied the legislation. For the first year under the EAJA, it was estimated that private parties

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NOTE.--Footnotes appear at end of article.

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would win EAJA fee awards in 3,000 court cases and about 2,700 administrative cases. The total cost of the EAJA for that first year was pegged at $69 million. 5/

The experience since the EAJA took effect on October 1, 1981, however, has been far different. For the first nine months that the law was in place, private parties in court cases were awarded $683,518 under the EAJA, while $21,120 was awarded in administrative proceedings for the first twelve months. Of more than 11,000 agency proceedings subject to the EAJA in that first year, the private party applied for fees in only 103 cases, or in 0.8 percent of all covered cases. In the courts, only thirty fee applications were filed during the first nine months under the Act, even though the it was estimated in 1980 that the federal government loses 12,000 cases a year in federal court. 6/

These statistics suggest that the private bar is failing to enforce the EAJA's provisions as Congress had contemplated. The important congressional purposes in enacting the EAJA can be achieved only if attorneys are vigilant in seeking fees on behalf of their clients in appropriate cases.

The Small Business Legal Defense Committee is a non-profit organization committed to representing the interests of small enterprises. The Committee commissioned this handbook as an educational project, in the hope that the private bar, when fully infomed of the terms and applications of the EAJA, would increase its enforcement of the Act. Greater diligence in seeking fees under the EAJA will serve both the immediate interests of the private clients involved in each case, and the broader public interests identified by Congress in approving the Act.

This handbook begins with a "Checklist" of factors to be considered by a potential applicant for EAJA fees, and then discusses the various issues surrounding the enforcement of the EAJA. The Appendices to the handbook contain the text of the EAJA, related legislation applying to tax cases, a list of

Federal attorney fee statutes, a list of agency regulations implementing the EAJA, and the Model Rules promulgated for the EAJA by the Administrative Conference of the United States.

EAJA CHECKLIST

I. In a court action, if fees would be available from another party under the common law or by statute, fees are available from the federal government in the same manner.

II. Qualifications for other EAJA awards.

A. You must have prevailed against the federal government -- through judgment or settlement -- on at least a separable and concrete aspect of a non-tort action.

B. The government's position must not have been substantially justified.

C. Your client must be, either,

1. An individual with a net worth of less than $1 million, or

2. A business with --

a. A net worth of less than $5 million

b. Fewer than 500 employees, or

3. An agricultural cooperative or a non-profit organization.

D. If an administrative proceeding is involved, it must have been an adversary adjudication under 5 U.S.C. § 554.

E. The action must have been pending as of October 1, 1981.

III. Additional considerations affecting the strength of your claim.

A. Factors strengthening your claim.

1. If you prevailed on a motion for summary judgment, motion for dismissal, or other summary action

2. If the government voluntarily dismissed its claims

3. If the government previously lost in similar litigation against other parties.

B. Factors weakening your claim.

1. If the government promptly settled the dispute upon learning that its position was not justified.

2. If you have protracted the proceeding.

3. If the government was urging a credible extension of previous decisions.

4. If there was conflicting evidence on the merits of the claim, or if judgment was based on an assessment of the credibility of witnesses.

IV. Mechanics of the Fee Application.

A. The application must be filed within 30 days of the final disposition.

B. The application must include:

1. Statement of qualification of claimant as a party eligible for EAJA fees, including net worth information if relevant.

2. Detailed breakdown of hours claimed and work performed for fees, along with documentation of expenses.

C. Fees may be claimed for work before the effective date of the EAJA, October 1, 1981.

D. A fee of up to $75 an hour may be claimed.

II. The EAJA And The Courts

The EAJA imposed three major changes in the award of attorney fees and costs in federal courts: A) for the first time, the federal government is liable for its opponents' fees under the recognized exceptions to the "American rule" against awarding fees; B) prevailing parties can recover fees from the federal government if another statute authorizes fee awards against any party other than the federal government; and C) parties prevailing over the federal government are eligible for fee awards when the government's position was not substantially justified. In addition, all tort actions except those involving constitutional torts are expressly excluded from the statute's reach. 7/

A. Exceptions to the "American Rule"

The "American rule" prevents the recovery of attorney's fees except in four situations:

1) When recovery of fees is authorized by statute or contract;

2) When a party has conferred a common benefit by recovering a fund or property;

3) When a party willfully disobeys a court order;

4) When the losing party "acted in bad faith, vexatiously, wantonly, or for oppressive reasons."

Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240, 257-259 (1975). The EAJA removes the federal government's sovereign immunity against fee awards under those four exceptions. As provided in 28 U.S.C. § 2412(b) (emphasis added):

> Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency and any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law . . . .

One of the largest fee awards under the EAJA applied this expansion of the exceptions to the American rule. In Fitzgerald v. Hampton, 545 F. Supp. 53, 60 (D. D.C. 1982), the District Court found a "willful failure [of the Air Force] to adhere to the law. . . ." Consequently, the court applied the "bad faith" exception to the American rule under §2412(b) and awarded fees and costs to the plaintiff. See United States v. Burke, 548 F. Supp. 724, 729-30 (D.S.D. 1982) (awarding fees under "bad faith" exception for federal government's "inexcusable" failure to dismiss lawsuit against party who, as government knew, had violated no legal obligation to government).

To a potential fee applicant, the major appeal of §2412(b) is that it does not impose the limitations that apply to other fee awards authorized by the EAJA. Thus, all private litigants are potentially eligible for awards under §2412(b), regardless of their net worth or other considerations. In addition, the $75-per-hour statutory maximum for EAJA fees does not apply to fees awarded under §2412(b). Accordingly, the

exceptions to the American rule should be reviewed carefully to determine whether they might be applied to any contemplated fee application.

B. Fee Awards Under Specific Statutes

Section 2412(b) also provides that the United States is liable "to the same extent that any other party would be liable" under a specific statute allowing fee awards. Over 100 federal statutes [8] and an undetermined number of state statutes contain attorney's fee provisions. Of course, some fee-shifting statutes already authorize fees in actions against the federal government, [9] while others cover circumstances that cannot arise in litigation with the federal government. [10]

Nevertheless, §2412(b) has been used to win fees in suits claiming that federal officials denied individuals their constitutional rights. In Lauritzen v. Secretary of the Navy, 546 F. Supp. 1221 (C.D. Cal. 1982), the court pointed out that under the Civil Rights Attorneys Fees Act of 1976, 42 U.S.C. §1988, plaintiffs can recover fees in suits charging that state officials deprived them of their constitutional rights. After a careful review of the EAJA's legislative history, and based on the EAJA's purposes, the court concluded that Congress intended in §2412(b) "to make the United States liable for attorney's fees in actions against federal officials for vindication of constitutional rights analogous to those which can be brought against state officials under 42 U.S.C. §1983." Id. at 1228. See Premachandra v. Mitts, 548 F. Supp. 117, 120-21 (E.D. Mo. 1982).

Muth v. Marsh, 525 F. Supp. 604, 609 (D.D.C. 1981), applied the EAJA to an action against the federal government under the Age Discrimination in Employment Act (ADEA). "Since a successful ADEA litigant may recover legal fees and costs from a nongovernmental defendant, . . ., the [EAJA]'s rule of equal treatment as to public and private defendants permits a

prevailing party to recover attorneys' fees and costs in an ADEA action against the United States." See WATCH v. Harris, 535 F. Supp. 9 (D. Conn. 1981) (awarding fees under §2412(b) on basis of National Historic Preservation Act).

Other fee statutes may carry less stringent conditions on fee awards than those in the fee award sections of the EAJA. As a result, presenting a fee application under the other statute, as applied to the federal government by §2412(b), will often be more advantageous than seeking a fee directly under the EAJA.

C. Awards When The Government's Position Is Not Substantially Justified

The EAJA's major expansion of the government's liability for fees in federal court is achieved by 28 U.S.C. §2412(d)(1)(A), which applies to all non-tort actions between the federal government and small businesses, individuals of modest means, non-profit organizations, or agricultural cooperatives:

> [A] court shall award to a prevailing party other than the United States fees and other expenses, . . . incurred by that party in any civil action (other than cases sounding in tort) brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

This provision creates three central questions facing a fee applicant: 1) Is the applicant a party as defined in 28 U.S.C. § 2412(2)(B)? 2) Is the applicant a "prevailing" party in the litigation? 3) Was the government's position substantially justified, or do special circumstances make a fee award unjust?

1) Is the Applicant a Party As Defined In 28 U.S.C. § 2412(d)(2)(B)?

Section 2412(d)(2)(B) applies to four groups of applicants for whom costs may be a deterrent to vindicating their rights against the federal government.

-- Individuals whose net worth did not exceed

$1,000,000 at the time the lawsuit was filed;

-- Any business with a net worth which did not exceed $5,000,000 at the time the lawsuit was filed, or which did not have more than 500 employees at the time the lawsuit was filed.

-- A non-profit organization exempt from taxation under Section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. §501(c)(3), regardless of its net worth.

-- A cooperative association as defined in Section 15(a) of the Agricultural Marketing Act, 12 U.S.C. §1141j(a), regardless of its net worth.

As a practical matter, an applicant can establish its identity as an agricultural cooperative or a non-profit organization under 26 U.S.C. § 501(c)(3) through submission of relevant documentation with an explanatory affidavit. An individual or business can establish net worth by submitting an affidavit detailing the net value of assets held. 11/ According to the EAJA's legislative history, net worth shall be established by subtracting total liabilities from total assets. Assets should be valued on the basis of acquisition cost rather than fair market value, an approach which avoids the expense of special valuations and which, for most assets, should result in a lower valuation. 12/

For a business applying for fees on the basis of having less than 500 employees, the EAJA provides no definition of employee. The Justice Department has adopted the sensible position that the common-law definition of employee should be used, which includes "all persons who regularly perform services for remuneration for the applicant, under the applicant's direction and control." 13/

The EAJA does not address the question of confidential treatment of financial data that may be submitted in connection with a fee application. Many agency rules applying the EAJA to agency adjudications specifically provide for such confidential treatment. 14/ Under ordinary court procedures, an applicant for fees under the EAJA may consider requesting that any confidential financial material be reviewed only in camera or otherwise be withheld from public disclosure.

2) Was the Applicant a "Prevailing Party" in the Litigation?

The EAJA restricts fee awards to a "prevailing party," but provides no definition of the term. 28 U.S.C. §2412(d). The legislative history states that the term is to be "broadly construed," 15/ and interpreted "consistent with the law that has developed under existing [attorney's fee] statutes." 16/ Thus, a party prevails sufficiently to qualify for a fee award not only when the party wins "final judgment following a full trial on the merits," but also "if the party obtains a favorable settlement of his case," or "if the plaintiff has sought a voluntary dismissal of a groundless complaint," or "even if the party does not ultimately prevail on all issues." 17/ Similarly, a party may seek fees under the EAJA on the basis of "an interim order which was central to the case . . . or where an interlocutory appeal is 'sufficiently significant and discrete to be treated as a separate unit.'" 18/

In implementing the EAJA, the courts have been faithful to this legislative history. The Ninth Circuit has ruled that a "prevailing party" under the EAJA is the same as a prevailing party under the Civil Rights Attorneys Fees Act of 1976, 42 U.S.C. § 1988, NLRB v. Doral Building Services, Inc., 680 F.2d 647 (9th Cir. 1982), and several courts have held that a party may "prevail" without winning a final judgment on the merits. Thus, private parties have been found to have prevailed under the EAJA in several cases which were settled on terms favorable to the private party. 19/ For the EAJA to apply, though, the relief gained through a settlement must be relief directly against the federal government. 20/ Similarly, courts have identified private parties as prevailing when the government has sought voluntary dismissal of complaints against those parties. 21/

A private party still may recover fees under the EAJA for those claims on which he prevailed, even if the government prevailed on other matters in dispute. Goldhaber v. Foley, 698 F.2d 193 (3d Cir. 1983). Thus, in Costantino v. United States,

536 F. Supp. 60 (E.D. Pa. 1982), the Court concluded that the taxpayer was entitled to recover that portion of her attorneys' fees that was attributable to the $1,283 refund she obtained through a settlement agreement. Moreover, fees also could be recovered for time spent on non-prevailing claims if they "overlapped and also supported the prosecution of a successful claim." Id. at 63, quoting Planned Parenthood Ass'n of Southeastern Pennsylvania, 508 F.Supp. 567, 570 (E.D. Pa. 1980); see Globe, Inc. v. United States, 553 F. Supp. 7, 10-11 (D.D.C. 1982).

Recovery of fees for an interim order was approved in Lauritzen v. Secretary of the Navy, 546 F.Supp. 1221 (C.D. Cal. 1982). The plaintiff in Lauritzen won a preliminary injunction against her discharge from the service pending administrative review of the charges against her. After she won relief in the adminstrative proceeding, the court awarded attorney fees for acquiring the preliminary injunction. And in Rico-Sorio v. U.S.I.N.S., 552 F. Supp. 965 (D. Or. 1982), fees were denied when the private party's success in gaining a temporary restraining order resulted only in delay of his deportation.

One peculiarity of the "prevailing party" question has arisen in condemnation proceedings brought by the federal government. Even if the landowner succeeds in winning a much higher value for his land than was offered by the government, he cannot be a prevailing party under the EAJA. United States v. 329.73 Acres of Land, 666 F.2d 281, 285 n.3 (5th Cir.), rehearing en banc granted, 681 F.2d 264 (1982); United States v. 341.45 Acres of Land, 542 F.Supp. 482, 487 (D. Minn. 1982). That result has been based on a Supreme Court holding that a landowner in a condemnation case could not recover court costs as a prevailing party under the predecessor to 28 U.S.C. § 2412. United States v. Bodcaw Co., 440 U.S. 202 (1979).

3. Was the Govermment's Position Substantially

Justified, or Do Special Circumstances Make a Fee Award Unjust?

The court decisions on the EAJA have turned most often on the question whether the Government's "position" was "substantially justified." In presenting an application under §2412(d), a party need only assert that no substantial justification was present for the government's position. Thereafter, "the burden of proof rest[s] with the Government." 22/ Congress imposed that burden because it is "far easier for the Government, which has control of the evidence, to prove the reasonableness of its action than it is for a private party to marshal the facts to prove that the government was unreasonable." 23/ The courts unanimously have imposed this burden on the government, and some have noted that the legislative history requires that the Government make a "strong showing" to carry that burden. 24/

a) What is the government's "position"?

In applying the "substantial justification" standard, some courts have attempted to distinguish between the government's litigating posture and the underlying agency action. Under this approach, the courts may award attorney's fees under the EAJA only if there is no substantial justification for the government's litigating position.

Learned arguments have been offered on both sides of this question. 25/ The inquiry, however, will rarely be significant. The reasonableness of the government's litigating position can rarely be determined without considering the nature, extent, and impact of the underlying agency action. There can be no "reasonable" defense on the merits of an "unreasonable" agency action.

The distinction between pre-litigation and litigation actions might be relevant if the government unsuccessfully asserted a jurisdictional defense -- such as the statute of limitations, standing to sue, or the like -- to defend plainly unreasonable administrative action. The jurisdictional argument

itself might have been reasonable, though unavailing, regardless of the merits or demerits of the underlying agency action. In that situation, the private party could not recover fees incurred with respect to the jurisdictional question, although recovery would be available under the EAJA for fees incurred in challenging the merits of the agency's action.

A more difficult question may arise, however, when the government concedes the correctness of the private party's position after the complaint is filed. The government's litigating position in such a case may be sweet reason itself, but the private party still has been forced by prior unreasonable actions to incur whatever fees and costs were required in order to bring the lawsuit. The Third Circuit Court of Appeals faced this question in Natural Resources Defense Council, Inc. v. EPA, No. 81-2068 (3d Cir., March 23, 1983). The majority opinion of Judge Gibbons persuasively explains that EAJA fees must be available in such a case for the expense of bringing suit.

The complaint in Natural Resources Defense Council challenged delays in the promulgation of certain regulations. After the complaint was filed, the government promptly issued most of the regulations in dispute. The government then argued that the plaintiff could not recover EAJA fees because the government's litigating position had been substantially justified.

In rejecting the government's view, Judge Gibbons focussed on the language of 28 U.S.C. §2412(d)(1)(A), which directs the award of fees "unless the court finds that the position of the United States was substantially justified. . . ." (Emphasis supplied). The EAJA itself defines "United States" as "any agency and any official of the United States acting in his or her official capacity." 28 U.S.C. §2412(d)(2)(C). Accordingly, Judge Gibbons reasoned that "position of the United States" refers to the position of all federal officials -- both agency decision-makers and litigating attorneys. He also

observed that, as a policy matter, a more restrictive interpretation of the "position of the United States" would be contrary to the entire thrust of the statute, id., at 14:

> [The government's argument] means that no matter how outrageously improper the agency action has been, and no matter how intransigently a wrong position has been maintained prior to the litigation, and no matter how often the same agency repeats the offending conduct, the statute has no application, so long as employees of the Justice Department act reasonably when they appear before the court.

The majority opinion quotes extensively from the legislative history of the EAJA to support its holding. Id. at 14-25. The essential point in this situation, however, is that a private party has been forced to incur substantial legal expense to mount a court challenge to unreasonable government action. That the government surrendered quickly in court does not alter the fact that the private party's legal expenses to that point were caused directly by the unreasonable government action that prompted the lawsuit. The purpose of the EAJA is to provide for recovery of those expenses so that small businesses and individuals will not be deterred from mounting such challenges.

The dissenting opinion of Judge Hunter in Natural Resources Defense Council relies on two points that do not withstand analysis. First, he claims that the court's holding will result in "almost automatic award of fees" in cases in which an agency's action has been found to be "arbitrary and capricious" or unsupported by "substantial evidence." Id. at 42. That assertion is flatly untrue. Several courts have found, somehow, that even though the government lost on substantial evidence grounds, its position was substantially justified. E.g., Cornella v. Schweiker, 553 F. Supp. 240 (D.S.D. 1982); Bennett v. Schweiker, 543 F. Supp. 897 (D.D.C. 1982). In any event, it is by no means clear that "automatic" EAJA fee awards in such cases would be contrary to the congressional intent. Certainly it is difficult to understand how "arbitrary and capricious" action could be substantially justified.

Judge Hunter also emphasizes the statement in the House Report that substantial justification for the government's position will likely not be present when there is a summary ruling against the government. Such a disposition, the House Report states, raises "the possibility that the Government was unreasonable in pursuing the litigation." Natural Resources Defense Council v. EPA, supra, at 43, citing House Report, supra, at 11 (emphasis in original). That passage, Judge Hunter suggests, demonstrates Congress's focus only the government's litigation position.

But the language quoted by Judge Hunter is irrelevant to the question presented in Natural Resources Defense Council, where the government conceded that its previous actions had been illegal. Because no court judgment -- summary or otherwise -- was reached on the merits of the complaint, the question before Judge Hunter was not whether the Government was "unreasonable in pursuing the litigation." Rather, the question was whether the EAJA covers fees incurred in bringing the lawsuit that forced the government to admit its error long before judgment. Because the EAJA plainly provides that a private party may be eligible for fee awards by "prevailing" through favorable settlement, supra, such a prevailing party must be entitled to the fees incurred in securing that settlement. No matter how reasonable the government attorneys are who negotiate that settlement, the private party still has been forced by unreasonable government actions -- the pre-litigation actions -- to incur attorney fees. The EAJA covers those fees.

b) What does "substantially justified" mean?

With a few exceptions, discussed below, courts have agreed that the substantial justification standard represents a "middle ground' between an automatic award of fees to a successful party and permitting fees only when the government's position was arbitrary or frivolous." Berman v. Schweiker, 531 F.Supp. 1149, 1154 (N.D. Ill. 1982). 26/ In particular, Congress

squarely rejected the proposal by the Department of Justice that fees only be awarded when government action was "arbitrary, frivolous, unreasonable, or groundless, or the United States continued to litigate after it clearly became so." That approach, Congress concluded, was "unnecessarily restrictive." Id. 27/

The substantial justification standard is generally expressed, based on the legislative history, in terms of "reasonableness." As the House Report on the EAJA explained:

> The test of whether or not a Government action is substantially justified is essentially one of reasonableness. Where the Government can show that its case had a reasonable basis both in law and fact, no award will be made.28/

In some cases, the government has argued that since the term "substantial justification" is drawn from Rule 37 of the Federal Rules of Civil Procedure -- as the legislative history states, 29/ -- Congress must have intended that the standard allow an EAJA fee award only, as under Rule 37, in the face of "captious" or "frivolous" or "indefensible" conduct. 30/ This argument not only flies in the face of the congressional statements that "reasonableness" is the proper EAJA standard, but also ignores the congressional rejection of the Justice Department's proposal that fees only be awarded when the government action was "arbitrary, frivolous, unreasonable or groundless." See p. 21, supra. Thus, the government has pressed in the courts the argument that was directly rejected by Congress. In light of the almost universal adoption of the reasonableness standard, the attempt has not succeeded. One court has addressed the government's Rule 37 argument directly, but concluded that it mischaracterizes the true congressional intent. Nunes-Correia v. Haig, 543 F.Supp. 812, 817 (D.D.C. 1982); see Natural Resources Defense Council, Inc. v. EPA, No. 81-2068 (3d Cir., March 23,1983) slip op. at 22-24.

Recognizing that the term "substantial justification"

might be subject to various interpretations, Congress provided some specific guidance for its application. Thus, the House Report identifies "[c]ertain types of case dispositions" that "may indicate that the Government action was not substantially justified." These include:

> [C]ases, for example, where there has been a judgment on the pleadings or where there is a directed verdict or where a prior suit on the same claim had been dismissed. Such cases clearly raise the possibility that the Government was unreasonable in pursuing the litigation.

The House Report emphasized, however, that there is no "presumption that the Government position was not substantially justified, simply because it lost the case." Indeed, the standard does not "require the Government to establish that its decision to litigate was based on a substantial probability of prevailing." 31/

One court's interpretation of the substantial justification standard appears to depart from the congressional intent. The Court of Claims adoped the view that fees should be awarded if the Government's actions were "reprehensible." 32/ That formulation appears far more strict than the "reasonableness" yardstick announced by Congress. Indeed, it is comparable to the standard initially proposed by the Department of Justice but found by Congress to be "too restrictive." 33/

c) The Application of the Substantial Justification Standard

Decisions under the EAJA have found no substantial justification for the government's actions in a variety of contexts. Several courts have awarded EAJA fees when they concluded that summary judgment was granted to the private party because the government's position was without any justification in law or fact. 34/

The government's position has been found not substantially justified when the government has voluntarily dismissed an IRS claim for a penalty assessment, 35/ and when it

has reached a settlement favorable to the private party. 36/ Two decisions have emphasized that earlier rulings against the government in similar cases should have prevented the government from pursuing the arguments presented in court. 37/ Finally, a number of cases have held that, although fees could not be awarded automatically when the government's position on the merits was not supported by substantial evidence, fees were available under the EAJA because there was no evidence at all supporting the government's position. 38/

Despite these cases awarding EAJA fees, the government's burden is not, in practice, all that difficult. In several cases, substantial justification was found, even though the government lost the case, because factual issues were present which made the government's position reasonable. 39/ Other decisions have denied fees even though the full facts showed the government's position to be unjustified, when the private party itself did not disclose those facts to the government. 40/

Similarly, the court in Donovan v. Dillingham, 668 F.2d 1196, 1199 (11th Cir. 1982), found the government's position not unreasonable because "the United States could not be expected to anticipate the holding or the basis of the holding" in a recent decision that controlled that case. And several decisions have found substantial justification under the EAJA because the government promptly sought to concede or settle disputes once the weakness of the government's position became plain. 41/

One decision has found the government's position was substantially justified even though it was contrary to precedent. In Wyandotte Savings Bank v. N.L.R.B., 682 F.2d 119 (6th Cir. 1982), the government challenged a previous decision of the Sixth Circuit concerning definition of a bargaining unit. Noting some disagreement within the Sixth Circuit on the legal question presented, the court found that the government was substantially justified in making a "reasonable attempt to reopen a closed question." Id. at 120.

d) Are "Special Circumstances" Present That would make a fee award Unjust?

Section 2412(d)(1) includes the provision that no fees need be awarded to a prevailing party when "special circumstances would make such an award unjust." Congress described this provision as a "safety valve" designed to "insure that the Government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts." Courts thus have discretion to deny EAJA fees on the basis of "equitable considerations." Id. 42/

In S & H Riggers & Erectors, Inc. v. O.S.H.R.C., 672 F.2d 426, 430-431 (5th Cir. 1982), the court relied on this safety valve to deny fees even though the decision on the merits of the lawsuit was controlled by prior precedent. The court emphasized that the agency had presented a new theory for overturning settled doctrine. On that basis, the Court concluded the the government's position represented what Congress described as a "novel but credible extension or interpretation of the law." A "special circumstance" barring a fee award in Metropolitan National Bank of Farmington v. United States, 49 A.F.T.R.2d 82-1090, 1093 (E.D. Mich. 1982) was the private party's "failure to provide full information" about a disputed transaction. In that situation, the court reasoned, the government "was not the true cause of the private party's litigation expenses" and a fee award would be unjust. See Matthews v. United States, 526 F. Supp. 993, 1009 (M.D. Ga. 1981) (delay by court in handing down decision constituted special circumstance making a fee award unjust).

The ruling in Nunes-Correia v. Haig, 543 F.Supp. 812, 820 (D.D.C. 1982), establishes important boundaries on the potentially expansive "special circumstances" exception. That case presented the first constitutional challenge to certain State Department regulations, and the government argued that "it

was reasonable, if not obligatory, for the government to assert all pertinent defenses." Id. The Court pointed out, though, that "it certainly does not follow that because the government's argument was untested, it was necessarily worthy of credit." Id. The court stressed (id.):

> The "special circumstances safety valve" does not create a different, less rigorous standard of review for all cases of first impression. It merely preserves government efforts to present creative legal interpretations, which though not yet commonly accepted, still merit the court's careful examination.

Given the weakness of the government's arguments in support of the challenged regulation, the court concluded that no special circumstances made a fee award unjust.

D. Tax and Social Security Cases --

Particular issues have arisen in connection with the EAJA's application to tax and social security cases. The legislative history of the EAJA reflects congressional concern over the impact of the statute on those two kinds of cases, which together represent a major portion of all civil litigation with the federal government. 43/ This section of the handbook will address: (1) legislation enacted as part of the Tax Equity and Fiscal Responsibility Act of 1982 which now controls attorney fee awards in tax cases and (2) the government's argument that the Social Security Act precludes the application of the EAJA to social security cases.

1) Fees In Tax Cases

Section 292 of the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA") expressly supercedes the EAJA for tax cases by creating a new §7430 of the Internal Revenue Code. 44/ The new 26 U.S.C. §7430 allows the recovery of "reasonable litigation costs" up to $25,000 in any civil tax litigation in which the private party, after exhausting administrative remedies, "prevails." A private party is a prevailing party if it:

i) establishes that the position of the

United States in the civil proceeding was unreasonable, and

ii) (I) has substantially prevailed with respect to the amount in controversy, or (II) has substantially prevailed with respect to the most significant issue or set of issues presented.

26 U.S.C. §7430(c)(2)(A) (emphasis added). The term "reasonable litigation costs" is defined to include court costs, expert witness fees, the cost of studies, and "reasonable" attorney fees. Id. §7430(c)(1)(A). The statute applies to cases commenced after February 28, 1983, id. §292(e)(1), and does not apply to any litigation beginning after December 31, 1985. TEFRA §7430(f).

Although the the EAJA will continue to apply to tax cases pending on February 28, 1983, the new §7430 of the Internal Revenue Code will result in somewhat different treatment of fee requests in subsequent cases. For tax litigation, the controlling substantive tests for fee awards -- though phrased differently than in the EAJA -- will likely remain largely the same. Thus, fees may be awarded in a tax case if the government's position is "unreasonable," which is the prevailing version of the substantial justification standard of the EAJA. And §7430 of the Internal Revenue Code specifically defines the circumstances in which a party may be deemed to have prevailed, but that definition is consistent with pre-existing law defining "prevailing party" on which the EAJA relies. 45/

Fee claimants in tax cases beginning after February 28, 1983, will face three major changes from the EAJA. First, they will have to shoulder the burden of demonstrating that the government's position was unreasonable. Id. §7430(c)(2)(A)(i). Second, the question of the reasonableness of the government's position is squarely confined to its position "in the civil proceeding." Id. Third, the claimant will not be confined to

the $75-per-hour maximum on attorney's fees that is set by the EAJA, but he also will not be able to recover more than $25,000 for any single action, or for more than one action when multiple lawsuits could have been joined or consolidated. Id. §§7430(b) & (d).

2) Fees in Social Security Cases.

The government has urged in several cases that §406(b)(1) of the Social Security Act, 42 U.S.C. §406(b)(1), bars the award in social security cases of fees under the EAJA. Most courts addressing this claim have ruled that the argument misreads § 406(b)(1), which applies only to the recovery of past due benefits where the claimant has a contingency fee arrangement with his lawyer. In those circumstances, §406(b)(1) limits the attorney's fee to 25% of the total judgment. Since §406(b)(1) in no way addresses the question of fee awards from the government, it is irrelevant to the EAJA. 46/ Indeed, the Conference Report on the EAJA squarely states that although administrative proceedings under the Social Security Act are not covered by the EAJA, "civil actions should be covered." 47/

E. The Mechanics of An EAJA Fee Application

1) Fee Applications Must Be Filed Within 30 Days of Final Judgment

Section 2412(d)(1)(B) provides that a fee application under the EAJA must be filed "within thirty days of final judgment in the action." The statute does permit fee awards on the basis of interim orders, see p. 13, supra, but it has been held that the 30-day requirement from time of final judgment is jurisdictional and may not be extended. Wallis v. United States, No. 453-39C (Ct. Cl. Nov. 25, 1981).

Some dispute has arisen over when the 30-day period begins to run. In McDonald v. Schweiker, 551 F.Supp. 327 (N.D. Ind. 1982), the court resolved this question by stressing Congress' use of the term "final judgment." in §2412(d)(2):

"[T]he courts have placed great weight upon whether Congress uses the words 'final judgment' as opposed to merely 'the judgment entered.'" Id. at 329. Use of the term "final judgment," the court held, reflected the congressional intent that the 30-day period not begin to run until either the time to file an appeal has expired or the decision has been affirmed by the court of last resort. The court stated that such a ruling "not only makes practical sense but satisfies Congress' ultimate purpose in enacting the Act" by allowing full review of the reasonableness of the government's action. Id. at 330. Thus, the McDonald court concluded that the 30-day period did not begin to run when the claimant won summary judgment, but only when the Court of Appeals dismissed the government's appeal with prejudice. In Bowers v. Moffett, No. 81-2674 (D.D.C. June 15, 1982), the 30-day period was held to begin at the time a settlement agreement was filed with the court.

2) The Litigation Must Have Been "Pending" As of October 1, 1981

A question of decreasing significance, as time goes on, has been what cases were "pending" on October 1, 1981, the first effective date of the EAJA. 48/

The courts generally have been receptive to fee applicants in deciding whether a case was still "pending" under the EAJA on October 1, 1981. In Berman v. Schweiker 531 F.Supp. 1149, 1151-52 (N.D. Ill. 1982), the court's judgment was issued on August 17, 1981. The court concluded, nevertheless, that since the time for the government to appeal did not expire for another 60 days thereafter, the case was still pending on October 1, 1981. Similar decisions have been reached in a number of other cases, often analogizing to interpretations of the Civil Rights Attorneys' Fees Act, 42 U.S.C. §1988. 49/ A case has been held not pending under the EAJA, however, when the only contested issue as of October 1, 1981, was attorney fees themselves. Crosby v. Bowling, 683 F.2d 1068, 1075 (7th Cir. 1982).

3. The Fee Application

A few federal courts have promulgated specific rules for EAJA applications. 50/ For the most part, however, an EAJA claimant has no guidance from the court as to the form of the application. At the least, an EAJA fee application should include all of the elements now commonly required of parties seeking fee awards under other statutes: 51/

1) A detailed breakdown of hours spent on the case, identifying the tasks undertaken and allocating the time claimed among the various issues and activities in the case;

2) A statement of the hourly fee claimed, along with justification for that fee based on prevailing market rates;

3) An explanation of any factors that might justify granting a fee higher then the statutory maximum of $75 an hour.

4) Explanation and documentation for claimed costs and expenses, including expert witness fees.

Section 2412(d)(2)(A) states that fees shall not exceed $75 per hour unless the court determines that "an increase in the cost of living" or a special factor, such as "the limited availability of qualified attorneys" for the proceedings involved, justifies a higher fee. The Conference Report on the EAJA emphasized that fees should be granted on the basis of "general professional standards." Thus, "the computation of attorney fees should be based on prevailing market rates without reference to the fee arrangements between the attorney and client." 52/ By and large, the courts have not granted an hourly fee above $75. 53/ A notable exception is Natural Resources Defense Council, Inc. v. EPA, No. 81-2068 (3d Cir., March 23, 1983), where the Third Circuit concluded that inflation since October 1, 1981, justified a maximum fee of $77.86 an hour. Also, the fee award can be reduced or denied if the prevailing party "unduly and unreasonably protracted" the proceeding. 28 U.S.C. §2412(d)(1)(C).

The EAJA makes no express provision for calculating fee

awards for house counsel or public interest lawyers. The "prevailing market" approach, however, suggests that attorneys whose time is not charged to the client on an hourly basis still may recover the prevailing market rate for his type of services under EAJA. This approach is reflected in Ocasio v. Schweiker, 540 F.Supp. 1320, 1323 (S.D.N.Y. 1982), in which an award to the Legal Aid Society, granted for the efforts of one of its salaried attorneys, was made on the basis of the EAJA's ordinary rate of $75 per hour. 54/

Courts have allowed as "expenses" associated with a litigation under the EAJA both paralegal costs, Hoang Ha v. Schweiker, 541 F.Supp. 711, 714 (N.D. Cal. 1982), and the cost of assistance from a law student. Berman v. Schweiker, 531 F.Supp. 1149, 1154-55 (N.D. Ill. 1982). In both instances, the courts reasoned that using non-lawyers for certain tasks would hold down overall costs.

The fee application can include expenses incurred in an administrative proceeding before the court suit, but that administrative proceeding must have been an "adversary adjudication, as defined in [5 U.S.C. § 504(a)], or an adversary adjudication subject to the Contract Disputes Act of 1978." 28 U.S.C. § 2412(d)(3). Accordingly, in Muth v. Marsh, 525 F.Supp. 604, 609 (D.D.C. 1981), the private party could not recover fees for a hearing before the Equal Employment Opportunity Commission that was subject to de novo review in the District Court and therefore did not fall within the definition of an adversary adjudication in 5 U.S.C. §554(a). Similarly, a successful claimant in a social security action cannot recover any fees incurred in administrative proceedings of the Social Security Administration. Wolverton v. Schweiker, 533 F.Supp. 420, 423-424 (D. Idaho, 1982); Berman v. Schweiker, 531 F.Supp. 1149, 1153 (N.D. Ill. 1982).

4) Fees Incurred Before October 1, 1981 - By a large majority, the courts have held that a prevailing party under the

EAJA may recover fees and costs incurred prior to the effective date of the Act. 55/ The reasons given for this conclusion include: (1) the statute and legislative history reflect no intent to limit fees awarded to those incurred after the effective date; (2) Awarding previously incurred fees is consistent with the intent to compensate those having limited resources with which to contest unreasonable government action; (3) A similar interpretation has been taken in interpreting similar attorneys' fee statutes; (4) the EAJA cost estimates by Congress reflect the expectation that such fees would be recoverable. 56/

5. Getting Paid -- Substantial confusion has surrounded the question of the source of funds to pay fee awards. The EAJA states that fees "may" be paid by the agency out of its own funds, or otherwise "shall be paid in the same manner as the payment of final judgments is made. . . ." 28 U.S.C. § 2412(d)(4)(A). Securing actual payment of EAJA fee awards has proved difficult, due to both bureaucratic delays and the government's right to appeal fee awards. 57/

Perhaps the only reliable method for getting paid arose in Paralyzed Veterans v. Smith, C.A. No. 79-1979 (C.D. Cal.) where the District Court awarded interim attorney fees. The government refused to pay the fees while the award was on appeal, but changed its position when the court indicated that the Attorney General would be found in contempt of court if payment were not made promptly. Payment was thereupon made. 58/

III. THE APPLICATION OF THE EAJA TO ADMINISTRATIVE PROCEEDINGS

The EAJA also authorizes fee awards for prevailing private parties in adversary administrative proceedings when the government's position was not substantially justified. 59/ Most of the standards for such awards are identical to those for EAJA awards in judicial proceedings -- e.g., the claimant must be a

"prevailing party" in a case in which the government's position was without "substantial justification." Consequently, this handbook will not recite those standards again. But some of the EAJA procedures are different in the administrative context, and agency interpretations and application of the EAJA's standards have varied in some ways from the views of the courts. Although generalizations about administrative rulings are limited by the difficulty of any systematic review of those decisions from many disparate sources, it appears that EAJA fee applicants have received far rougher treatment in agency proceedings than in the courts.

The Administrative Conference of the United States promulgated "Model Rules" for the implementation of the EAJA in administrative proceedings. 60/ On some questions, the Model Rules address matters not specifically covered in the EAJA or its legislative history. The Model Rules have been adopted, with minor revisions, by 30 of the 31 agencies that have approved EAJA regulations. 61/ For convenience, this handbook refers to relevant provisions in the Model Rules without tracking each provision through each agency's regulations, although some departures from the Model Rules by particular agencies are noted. A fee claimant, however, must consult the rules of the particular agency before which he is appearing, and should not rely only on the Model Rules.

A. Adversary Adjudication

The threshold question for an EAJA applicant is whether the proceeding involved is an "adversary adjudication." 5 U.S.C. §504(a)(1). The statute defines that term as an "adjudication under Section 554 of [Title 5] in which the position of the United States is represented by counsel or otherwise." Id. §504(b)(1)(c). It is sometimes difficult to determine whether a proceeding is "under section 554," see 46 Fed. Reg. 32901, although some agency regulations specifically enumerate the

proceedings that are covered by the EAJA. E.g., 29 C.F.R. § 16.104 (Dept. of Labor). The statutory definition expressly excludes proceedings for setting rates or renewing or granting licenses, id., although it includes proceedings "involving the suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of license." 62/

A dispute has developed over whether the EAJA applies to proceedings before the boards of contract appeals. Those proceedings traditionally have been considered not to be adjudications under 5 U.S.C. §554. 63/ Indeed, four agencies have provided by regulation that the EAJA does not apply to their boards of contract appeals. 64/

Several boards of contract appeals nevertheless asserted the power to award EAJA fees because § 8(d) of the Contract Disputes Act states that those boards are "authorized to grant any relief that would be available to a litigant asserting a contract claim in the Court of Claims." 41 U.S.C. § 607(d). Since the Court of Claims can award EAJA fees, the reasoning goes, the Contract Disputes Act gives that power to the boards. 65/ Moreover, fees may be recovered for time spent before a board of contract appeals if the claimant then prevails on appeal to the Court of Claims. 28 U.S.C. §2412(d)(3). Two boards of contract appeals asserted the power to make fee awards even though agency regulations expressly deny them that power. 66/ Since government contractors have the option of pursuing a claim before the agency's board of contract appeals or the United States Claims Court, 67/ barring fee awards by the boards of contract appeals could have the effect of channeling cases only to the Claims Court, where a prevailing party could win EAJA fees. Such a result would thwart the congressional purpose in establishing the boards of contract appeals as an alternative forum for resolving contract disputes with the government.

Despite these considerations, the Federal Circuit has

ruled that the EAJA does not apply to boards of contract appeals. In Fidelity Constr. Co. v. United States, No. 27-82 (Fed. Cir., Feb. 18, 1982), the court emphasized that the EAJA does not specifically grant the boards the power to award fees. The court refused to infer that power from the general delegation language of the Contract Disputes Act.

B. Is The Claimant A Party?

The definition of parties eligible to claim EAJA fees in administrative proceedings, 5 U.S.C. §504(b)(1)(B), is virtually identical to the definition for claimants in judicial actions. Supra. The only variation concerns businesses. EAJA fees may be claimed in court by a business with fewer than 500 employees and a net worth of less than $5 million, 28 U.S.C. § 2412(d)(2)(B); 5 U.S.C. §504(b)(1)(A), but businesses claiming fees in agency actions must have both a net worth of less than $5 million and fewer than 500 employees. That definition also appears in the Model Rules, §0.104, 46 Fed. Reg. 32912. 69/ The legislative history provides no reason for the variance between the two definitions, suggesting that it may have been inadvertent.

The Model Rules provide for the aggregation of the assets and employees of the fee applicant with the assets and employees of all its affiliates, defining affiliates in terms of "control" of a majority interest in another entity. Id. §104(f). Under the NLRB's version of that rule, an administrative law judge (ALJ) has found that an applicant improperly failed to include in its net worth the assets of its parent company. 69/ Another ALJ refused to apply that same rule to a union local, however, to include the international union as an "affiliate" of the local for the calculation of net worth under the EAJA. 70/ The ALJ pointed out that the statute's statement of purpose asserts that labor organizations are among the groups that Congress wished to aid by that legislation. Most

local unions are part of international unions with assets greater than $5 million. To consider all local unions to be "affiliates" of international unions under the EAJA, the decision suggests, would limit the EAJA's application to "small, independent, in-plant groups of workers" and thereby would "nullify the purpose of the Act."[71]

The proper calculation of net worth under the EAJA was addressed in the hearing officer's decision in an NLRB case. [72] The fee applicant calculated its net worth by valuing assets at "cost less accumulated depreciation." The ALJ concluded that neither the EAJA nor the Model Rules permit such valuation, but require that assets be listed at either acquisition cost or fair market value.

The Model Rules specifically require that a fee applicant submit a "detailed exhibit showing the net worth of the applicant and any affiliates," although no set format for such an exhibit is prescribed. [73] The rules also authorize the filing of a motion seeking confidential treatment of financial information and explaining why the information "falls within one or more of the specific exemptions from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. § 552(b)(1)-(9), why public disclosure of the information would adversely affect the applicant, and why disclosure is not required in the public interest." [74] The hearing officer has discretion to include the information in the public record of the proceeding or to grant the motion for confidential treatment. The EAJA regulations of the Department of Labor, however, do not provide for such confidential treatment. 29 C.F.R. § 16.202(b), 46 Fed. Reg. 63023.

C. Is The Claimant A Prevailing Party?

The definition of a prevailing party for adminstrative proceedings is the same as in judicial proceedings for the EAJA. 5 U.S.C. § 504(a)(1). Supra. The Model

Rules state that a claim for fees may be based on victory "in the proceedings or in a significant and discrete substantive portion of the proceeding." 75/ Under this approach, in B.A.B. Metal Fabricators, Inc., 76/ the ALJ found the fee claimant had "prevailed" on one of the two citations lodged against him even though he lost on the other citation. And in Claude C. Wood Co, 77/ the Board of Contract Appeals for the Department of Agriculture ruled that a claimant was not a prevailing party even though he won some money on his appeal, because the appellate judgment was less than the initial award made by the contracting officer.

Some agency decisions on the prevailing party issue, however, appear to conflict with the view of prevailing party expressed in the Model Rules and in judicial decisions under the EAJA. In an NLRB case, the ALJ found that the employees claiming EAJA fees were not prevailing parties because, although they won reinstatement to their jobs under a settlement agreement, there was no indication that they had won back pay. 78/ And an ALJ of the National Transportation Safety Board held that, even though the claimant had succeeded by settlement in recovering his airman's certificate, he could not be considered a prevailing party since he agreed to submit periodic supplemental medical evaluations to maintain his certificate. 79/

The Model Rules make no provision for EAJA awards to intervenors in administrative proceedings. The Administrative Conference recognized that such an award might be appropriate, although "situations in which intervenors actually receive awards will probably be rare." 46 Fed. Reg. 32903. In deferring ruling on an EAJA claim by an intervenor in Northern Indiana Public Service Co., No. 50-367 (Aug 6, 1982), the Nuclear Regulatory Commission (NRC) observed that its appropriations legislation directs that no NRC funds be paid to intervenors in NRC proceedings. The Commission stated that it would seek advice from the Comptroller General to resolve this apparent conflict

between the EAJA and its appropriations act. But because §504(d)(1) provides for payment of EAJA awards in administrative cases either from general government or from agency funds, the conflict perceived by the NRC is not significant.

D. Was The Government's Postion Substantially Justified?

As in court proceedings, an EAJA fee claimant cannot succeed before an agency if the government carries its burden of showing that its position was substantially justified. 80/ The Model Rules directly phrase that burden as "showing that its position was reasonable in law and fact." 81/

Some agencies have been a bit venturesome in interpreting the substantial justification test. In Hocking Valley Steel Erectors, Inc., 82/ an ALJ decided that the proper test was "whether there is substantial evidence in the record to support conclusions reached by [the Secretary of Labor] on issues in question. Cf., Universal Camera Corp. v. NLRB, 340 U.S. 474." And an ALJ at the National Transportation Safety Board erroneously suggested that, following the analogy to Rule 37 of the Federal Rules of Civil Procedure, awards should be made only when the losing party has taken "an 'indefensible position'; engaged in 'captious or frivolous conduct'; or acted without 'good faith' in taking the action." 83/ Supra.

Administrative application of the substantial justification standard appears to have been generally favorable to the government. 84/ The agency's position has been judged substantially justified when the decision-maker perceived some evidence supporting the government's position, 85/ or conflicting evidence on the central issues raised, 86/ or concluded that the government had made out a prima facie case. 87/ Similarly, substantial justification was found for government actions that were based on a strict reading of a prior ruling, 88/ and on narrow interpretations of government contracts. 89/

A few adminstrative decisions have found no substantial justification for the government's position. In Columbia Manufacturing Corp., 90/ the ALJ concluded that there was no justification for the government's position when it had information prior to trial that it "was relying on at best unreliable and at worst perjured testimony." The government's failure to present even a prima facie case on its claims in Haynes-Trane Service Agency, Inc. 91/ prompted the ALJ to conclude that an EAJA award was appropriate. And in Sottile v. Helms, 92/ an ALJ found no substantial justification because the Federal Aviation Administration had sought the revocation of the claimant's Flight Examiner designation even though the only complaining witness had recanted his story under oath.

E. Do Special Circumstances Make An Award Unjust?

The "special circumstances" standard is identical to the standard that applies to judicial proceedings. See 5 U.S.C. § 504(a)(1), supra. This provision is incorporated in the Model Rules along with the statutory requirement that any EAJA award will be denied or reduced "to the extent that the party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy." 93/

F. The Mechanics Of a Fee Application In Administrative Proceedings

The statutory procedures for filing an EAJA fee application in an adminstrative proceeding are similar to those in court actions, supra, although the Model Rules specify those procedures in somewhat greater detail.

1. The Application -- Section 0.201(a) of the Model Rules directs that a fee application "show that the applicant in the proceeding has prevailed and identify the position of an agency or agencies that the appellant alleges was not substantially justified." 46 Fed. Reg. 32913. Applicants should

state the number of their employees (if applicable), that their net worth falls within the statutory maximum, and "describe briefly the type and purpose of its organization or business." Id. Non-profit organizations need not file a net worth statement, but should submit any existing ruling from the Internal Revenue Service that they are tax-exempt. Id., §0.201(b). And agricultural cooperatives need only assert that they are cooperative associations. Id. Finally, the application should state the fees and expenses claimed.

Applicants are also directed to document all claimed fees and expenses, "showing the hours spent in connection with the proceeding by each individual, a description of the specific services performed, the rate at which each fee has been computed, [and] any expenses for which reimbursement is sought." Id, §0.203, 46 Fed. Reg. 32914. Although applicants plainly should provide substantial detail for claimed fees and expenses, a hearing officer with National Transportation Safety Board has criticized one agency for "attempt[ing] to nitpick each item submitted" when "sufficient detail has been submitted to accurately assess the apparent relative value and appropriateness of the cost items included." 94/

2. Time For Filing -- The EAJA directs that the fee application be filed within thirty days of a "final disposition in the adversary adjudication." The Model Rules provide that fees can be claimed before a final disposition "in a significant and discrete substantive portion of the proceeding, but in no case later than 30 days after this agency's final disposition . . . ." Model Rules §0.204(a), 46 Fed. Reg. 32914. Fee proceedings are to be stayed pending any review or reconsideration of a final decision. Id. §0.204(b).

Unlike the statute, the Model Rules are very explicit as to what constitutes a final disposition, although these specifics may vary among the individual agencies (Model Rules, §0.204(c)):

a) An initial or recommended decision which has become final; or

b) An order disposing of petitions for reconsideration of a final order; or

c) An order for which the period has expired in which a petition for reconsideration could have been filed; or

d) A final order or other resolution, "such as settlement or voluntary dismissal, which is not suject to a petition for reconsideration."

The thirty-day period for filing the fee application has been interpreted as jurisdictional and strictly applied. In Monark Boat Co., 262 NLRB No. 124 (1982), the Board stressed that any statute relinquishing sovereign immunity must be strictly construed, and emphasized the mandatory language used in the statute.

> We further note that the legislative history of EAJA confirms that Congress intentionally drafted the 30-day period as a mandatory condition. The House Conference Report states that the Senate bill contained a provision (adopted by the House) which "requires a party seeking an award of fees and other expenses to submit an application for them within thirty days of final judgment." [Conference Report, supra, at 26, reprinted in [1980], U.S. Code Cong. & AD, News 5015] (emphasis supplied).

262 NLRB No. 724, at 3. The Board therefore refused to apply to an EAJA application the Board's own rule permitting a three-day extension of a filing period to permit mail service. 95/ Similar reasoning led to the same strict interpretation of the thirty-day period by a hearing officer of the Occupational Safety and Health Review Commission. 96/

The basic lesson is to make sure the fee application is filed safely within the thirty-day period.

3. Subsequent Pleadings -- The Model Rules call for agency counsel to file an answer within thirty days, and failure to file the answer is to be "treated as a consent to the award requested." Model Rules § 0.302(a), 46 Fed. Reg. 32914. The fee applicant then has 15 days to file a reply. Id. § 0.303. In the

absence of a special request by either party, the award will be determined solely "on the basis of the written record," id. §0.306, and the decision must include written findings and conclusions. Id. §0.307. If the applicant has sought fees from more than one agency, as permitted in §0.108 of the Model Rules, responsibility for the fee award shall be allocated among those agencies. Id., §0.307, 46 Fed. Reg. 32915.

4. The Amount Of An Award -- For administrative proceedings, as in court actions, the EAJA prescribes attorney fee awards based on "prevailing market rates." 5 U.S.C. §504(b)(1)(A). But awards should not exceed $75 an hour "unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceeding involved, justifies a higher fee." Id., § 504(b)(1)(A)(ii) (emphasis added). 97/ The Model Rules directly address the question of what fee is available for house counsel or a salaried attorney, instructing that the fee be based on the "fully allocated cost of services." Model Rules, §0.106(C)(1), 46 Fed. Reg. 32913. This approach, however, departs from the congressional intent that EAJA fees approximate "prevailing market rates" rather than the specific fee arrangement between counsel and the prevailing party. See p. 36, supra.

The Administrative Conference, in its notes to the Model Rules, recognized that fees and expenses incurred before proceedings are initiated "will occasionally be recoverable, since activities like the drafting of a complaint will necessarily occur before the proceeding begins." 46 Fed. Reg. 32904. Nevertheless, one decision already has declined to award fees in that circumstance. 98/

The award of fees for services rendered in agency actions before the effective date of the EAJA remains an open question. Some administrative decisions have followed the judicial practice under other fee statutes of awarding such fees

so long as the action was "pending" on the effective date of the EAJA. 99/ Others, however, have refused to do so, insisting on the need to construe strictly all waivers of sovereign immunity. 100/

5. Appeals -- The EAJA does not provide for agency review of fee awards by hearing officers. Nevertheless, in many agencies such review has been undertaken before an award decision becomes final. The Administrative Conference, while acknowledging that the EAJA may be read to exclude agency review of fee decisions, concluded that agency review should proceed under 5 U.S.C. § 557, 46 Fed. Reg. 32910. Any other course, the Administrative Conference reasoned, would be such a dramatic departure from ordinary agency practice that it should not be inferred from congressional silence as to whether such review should occur. Accordingly, the Model Rules allow for such review, as do most agency regulations. 101/ In these circumstances, an applicant whose fee award is reversed through agency review might consider a court challenge to that review as unauthorized by the statute.

In any event, the EAJA explicitly provides for appeal of any fee determination to whatever court would have jurisdiction over an appeal of the merits of the agency decision. The dissatisfied claimant must file a petition for leave to appeal, and court modification of the award may take place only if an abuse of discretion is found. 5 U.S.C. §504(c)(2).

6. Getting Paid -- The same confusion besets payments of EAJA fee awards in agency actions as surrounds judicial fee awards. Supra. In the first 12 months under the EAJA, no fee award from an administrative proceeding was actually paid. 102/

FOOTNOTES

1/ Pub. L. No. 96-481, 94 Stat. 2325 (1980), adding § 504 to Chapter 5 of the U.S. Code and § 2412 to Chapter 28 of the U.S. Code.

2/ Id., § 202(a).

3/ H. Rep. No. 1434, 96th Cong., 2d Sess. 25 (1980), reprinted in, [1980] U.S. CODE CONG. & AD. NEWS 5014 [hereinafter cited as "Conference Report"].

4/ Cong. Rec. S. 13690 (daily ed. Sept. 26, 1980) (remarks of Sen. DeConcini); See id., S. 13876 (daily ed. Sept. 30, 1980) (remarks of Sen. Thurmond).

5/ H. Rep. No. 1418, 96th Cong., 2d Sess. 21-22 (1980), reprinted in [1980] U.S. CODE CONG. & AD. NEWS 5001-5002 [hereinafter cited as "House Report"].

6/ These statistics come from three sources: The House Report, supra; Report by the Director of the Administrative Office of the United States Courts on Requests for Fees and Expenses Under the Equal Access to Justice Act of 1980, October 1, 1981 through June 30, 1982 (September 22, 1982); and Report of the Chairman of the Administrative Conference of the United States on Agency Activities under the Equal Access to Justice Act, October 1, 1981 - September 30, 1982 (December 9, 1982), [hereinafter cited as "ACUS Annual Report on the EAJA"].

7/ 28 U.S.C. §2412(d)(1)(A). The EAJA's coverage of actions involving constitutional torts was noted in the legislative history, House Report, supra, at 18, reprinted in [1980] U.S. CODE CONG. & AD. NEWS 4997, and has been recognized by the courts. Knights of the Ku Klux Klan v. East Baton Rouge Parish School Board, 679 F.2d 64, 68 (5th Cir. 1982).

8/ See Appendix C infra.

9/ E.g., Freedom of Information Act, 5 U.S.C. § 552(a)(4).

10/ E.g., Clayton Antitrust Act, 5 U.S.C. § 15.

11/ See United States v. Pomp, 538 F. Supp. 513, 515 (M.D. Fla. 1982); Berman v. United States, 534 F. Supp. 641, 642 (N.D. Ohio 1982) (applicant failed to submit any indication of net worth).

12/ Id. S.Rep. No. 253, 96th Cong., 1st Sess. 17 (1979) (hereinafter cited as "Senate Report"); House Report, supra, at 15, reprinted in [1980] U.S. CODE CONG. & AD. NEWS 4994. Although no court decisions have interpreted the "net worth" standard, administrative rulings have addressed questions arising under it. See infra.

13/ Award of Attorney Fees and Other Expenses in Judicial Proceedings Under the Equal Access to Justice Act, Department of Justice, p. 24.

The Seventh Circuit has ruled that officials of local governments are not parties covered by the EAJA. Commissioners of Highways v. United States, 684 F.2d 443 (7th Cir. 1982).

14/ See pp. 45-46, infra.

15/ H. Rep. No. 9-1005, Part I, 96th Cong., 2d Sess. 10 (1980).

16/ House Report, supra, at 11 reprinted in, [1980] U.S. CODE CONG. & AD. NEWS 4990.

17/ Conference Report, supra, at 21-22, reprinted in [1980] U.S. CODE CONG. & AD NEWS 5010-5011.

18/ House Report, supra, at 11, reprinted in [1980] U.S. CODE CONG. & AD NEWS 4990 (citations omitted).

19/ E.g., Allen v. United States, 547 F.Supp. 357, 358 (N.D. Ill. 1982); Underwood v. Pierce, 547 F.Supp. 256, 259 (C.D. Cal. 1982); Photo Data, Inc. v. Sawyer, 533 F. Supp. 348, 351 (D.D.C. 1982).

20/ In Citizens Coalition for Block Grant Compliance v. City of Euclid, 537 F.Supp. 422 (N.D. Ohio 1982), the plaintiffs sought a judgment ordering the City of Euclid to comply with federal fair housing standards. To that end, the plaintiffs joined the federal Department of Housing and Urban Development (HUD) as a party, seeking to force termination of federal housing funds for Euclid and thereby to "bring pressure to bear on Euclid." Id. at 425. The case was settled when Euclid agreed to comply with federal standards, but HUD was not significantly effected by the agreement. The court ruled that the "plaintiffs largely achieved their ultimate goal," but not "their intermediate goal vis a vis HUD." Id. In those circumstances, the plaintiffs had not prevailed against the federal government and could not win fees under the EAJA.

21/ E.g., United States v. Pomp, 538 F.Supp. 513, 514 (M.D. Fla. 1982); Alspach v. District Director of Internal Revenue, 527 F.Supp. 225 (D.Md. 1981).

22/ Senate Report, supra, at 6; see House Report, supra, at 10, reprinted in [1980] U.S. CODE CONG. & AD. NEWS 4989.

23/ Senate Report, supra, at 6; see House Report, supra, at 11, reprinted in [1980] U.S. CODE CONG. & AD. NEWS 4989.

24/ E.g., S & H Riggers & Erectors, Inc. v. O.S.H.R.C., 672 F.2d 426, 431 (5th Cir. 1982), quoting House Report, supra, at 10, 18, reprinted in [1980] U.S. CODE CONG. & AD. NEWS 4989, 4997.

25/ Compare Tyler Business Services v. NLRB, 695 F.2d 73, 75-76 (4th Cir. 1982) ("position" means only stand in litigation); Broad Avenue Laundry and Tailoring v. United States, 693 F.2d 1387, 1390-1391 (Fed. Cir. 1982) (same); Operating Engineers Local Union No. 3, etc. v. Bohn, 541 F.Supp. 486, 493-495 (D. Utah 1982) (same); Alspach v. District Director of Internal Revenue, 527 F. Supp. 225, 228-229 (D. Md. 1981) (same); Natural Resources Defense Council v. EPA, No. 81-2068 (3d Cir., March 23, 1983) ("position" includes agency action); with Mcholland v. Schweiker, 546 F.Supp. 383, 386 (D.N.H. 1982); (same); Nunes-Correia v. Haig, 543 F.Supp. 812, 816-17 (D.D.C. 1982) (same); Photo Data, Inc. v. Sawyer, 533 F. Supp. 348, 352 (D.D.C. 1982) (same).

26/ See House Report, supra at 10-11, 14, reprinted in [1980] U.S. CODE CONG. & AD. NEWS 4989-4990, 4993; Senate Report, supra, at 15.

27/ Senate Report, supra, at 15; House Report, supra, at 14, reprinted in [1980] U.S. CODE CONG. & AD. NEWS 4993.

28/ House Report, supra, at 10; reprinted in [1980] U.S. CODE CONG. & AD. NEWS 4989.
(Cont'd)

See Tyler Business Services, Inc. v. NLRB, 695 F.2d 73, 75 (4th Cir. 1982); Wyandotte Savings Bank v. NLRB, 682 F.2d 119, 120 (6th Cir. 1982); S & H Riggers & Erectors, Inc. v. O.S.H.R.C., 672 F.2d 426, 430 (5th Cir. 1982); Citizens Coalition for Block Grant Compliance v. City of Euclid, 537 F.Supp. 422, 426 (N.D. Ohio 1982); Hoang Ha v. Schweiker, 541 F.Supp. 711, 712 (N.D. Cal. 1982); United States v. Pomp, 538 F.Supp. 513, 515 (M.D. Fla. 1982); Globe, Inc. v. United States, 553 F. Supp. 7 (D.D.C. 1982).

29/ See Senate Report, supra, at 14, 21.

30/ Award of Attorneys Fees and Other Expenses In Judicial Proceedings Under the Equal Access to Justice Act, Department of Justice, at 38-40.

31/ House Report, supra, at 11, reprinted in [1980] U.S. CODE CONG. & AD. NEWS 4989-4990. The language quoted from the House Report on substantial justification is duplicated in the Senate Report on the EAJA. Senate Report, supra, at 6-7.

32/ Papson v. United States, 82-1 U.S. Tax Cas. (CCH) ¶13,466 (Ct. Cl. 1982); Estate of Berg v. United States, 687 F.2d 377, 383 (Ct. Cl. 1982); Ellis v. United States, 550 F. Supp. 674, 680 (Ct. Cl. 1982).

33/ One District Court has urged that the substantial justification standard is "slightly above one based on reasonableness." Ulrich v. Schweiker, 548 F.Supp. 63, 65 (D. Idaho 1982). Such a fine calibration of the standard seems both impractical and contrary to the legislative history.

34/ McDonald v. Schweiker, 551 F.Supp. 327 (N.D. Ind. 1982) (challenge to denial of Social Security benefits); Nunes-Correia v. Haig, 543 F.Supp. 812 (D.D.C. 1982) (challenge to State Department prohibition on employment of individual married to alien who did not intend to become a citizen); Globe, Inc. v. United State[illegible] 553 F. Supp. 7 (D. D.C. 1982) (injunction against leasing gover[illegible]ent facility to competitor at below-market rate); Berman v. Schweiker, 531 F.Supp. 1149 (N.D.Ill. 1982) (revision of Social Security earnings record).

35/ Pomp v. United States, 538 F.Supp. 513 (M.D. Fla. 1982).

36/ Photo Data, Inc. v. Sawyer, 533 F.Supp. 348 (D.D.C 1982).

37/ Underwood v. Pierce, 547 F.Supp. 256, 261-62 (C.D. Cal. 1982); Hoang Ha v. Schweiker, 541 F.Supp. 711, 713 (N.D. Cal. 1982). Precedent contrary to the government's position does not always mean that a court will find no substantial justification. See pp. 27-28, infra.

38/ Moholland v. Schweiker, 546 F. Supp. 383 (D.N.H. 1982); Donovan v. Cunningham, 541 F. Supp. 276, 289 (S.D. Tex. 1982); Wolverton v. Schweiker, 533 F. Supp. 420, 425 (D. Idaho 1982); Spang v. United States, 533 F. Supp. 220, 226 (W.D. Okla. 1982).

39/ Donovan v. Miller Properties, Inc., 547 F. Supp. 785 (N.D. La. 1982) (unsettled area of law); Ulrich v. Schweiker, 548 F. Supp. 63, 65-66 (D. Idaho 1982) (uncertain evidence of social security applicant's headaches); Allen v. United States, 547 F. Supp. 357, 359, 360 (N.D. Ill. 1982) (IRS made "reasonable assumption" that party was responsible for corporation's tax payments); Kennedy v. United States, 542 F. Supp. 1046, 1048 (D.N.H. 1982) ("badges of fraud" justified challenge to real estate transaction.)

40/ Ellis v. United States, 550 F.Supp. 674, 678 (Ct. Cl. 1982) (private party did not present to Civil Service Commission employment facts that were determinative upon appeal); Aukes v. United States, No. 82-M-43 (D. Colo. Mar. 30, 1982) (failure to file tax returns).

41/ Operating Engineers Local Union No. 3, v. Bohr 541 F. Supp. 486, 496 (D. Utah 1982); Citizens Coalition for Block Grant Compliance v. City of Euclid, 537 F. Supp. 422, 425 (N.D. Ohio 1982); Alspach v. District Director of Internal Revenue, 527 F. Supp. 225, 229 (D. Md. 1981).

42/ See Senate Report, supra at 7; House Report, supra, at 11, reprinted in [1980] U.S. CODE CONG. & AD. NEWS 4990.

43/ See Cong. Rec. H10218-10221 (daily ed., Oct. 1, 1980) (remarks of Rep. Pickle).

44/ [1982] U.S. CODE CONG. & AD NEWS 251 (Pamphlet No. 7). The relevant portions of the new statute are reproduced in full in Appendix B.

Before the enactment of that statute, the Tax Court had concluded that, as an Article I tribunal, it was not covered by the EAJA. McQuistan v. Commissioner, 78 T.C. 807 (1982). The new legislation for attorney's fees in tax litigation expressly includes the Tax Court in its coverage.

The same jurisdictional question might be raised concerning the application of the EAJA in U.S. Bankruptcy courts. In Graham v. United States, No. 81-0188 (Bankr. D. Idaho Mar. 11, 1982), the court concluded that since bankruptcy courts at that time exercised all jurisdiction held by federal district courts, see 28 U.S.C. § 1471(c), the EAJA applied to bankruptcy court proceedings. But the status of the bankruptcy courts remains uncertain following the striking down of the Bankruptcy Act by the Supreme Court in Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 102 S.Ct. 2858 (1982), on the ground that an Article I court could not exercise the jurisdiction of Article III courts. Until Congress resolves this question, the EAJA cannot be assumed to apply in bankruptcy court actions.

Finally, the government has pursued this Article I argument unsuccessfully in arguing that the EAJA does not apply in the new U.S. Claims Court, successor to the Court of Claims under the Federal Courts Improvement Act of 1982. Since the EAJA was applied by the Court of Claims, see pp. 42-43, infra, it is only logical that the statute apply to the successor to that court, absent congressional direction to the contrary. Bailey v. United States, No. 230-80C (Cl. Ct. Jan. 13, 1983).

45 Section 7430(c)(2)(A)(ii)(II) does preclude a fractional fee award when a private party prevails on one or a few issues that are not "the most significant issue or set of issues presented." That variation from the EAJA is not especially material.

46/ Hornal v. Schweiker, 551 F. Supp. 612, 614-615 (M.D. Tenn. 1982); McDonald v. Schweiker, 551 F.Supp. 327, 330, 332 (N.D. Ind. 1982) Ocasio v. Schweiker, 540 F.Supp. 1320 (S.D.N.Y. 1982); Wolverton v. Schweiker, 533 F.Supp. 420 (D. Idaho 1982); Berman v. Schweiker, 531 F.Supp. 1149 (N.D. Ill. 1982); Kronheim v. Schweiker, No. 81-325-CIV-JWK (S.D. Fla. June 2, 1982); Shumate v. Harris 544 F. Supp. 779, (W.D. N.C. 1982). A few courts have, nevertheless, found that due to §406(b)(1), EAJA fees are not available in social security cases. Nichols v. Schweiker, No. C81-818R (W.D. Wash. Apr. 8, 1982); Ritchie v. Schweiker, C 80-4053 (N.D. Iowa Dec. 18, 1981).

47/ Conference Report, supra, at 12, reprinted in [1980] U.S. CODE CONG. & AD. NEWS 4991.

48/ If Congress permits the EAJA to expire on October 1, 1984, as currently provided in the Act, the converse question might arise, however.

49/ E.g., Tyler Business Systems v. NLRB, 695 F.2d 73, 77 (4th Cir. 1982); United States For Heydt v. Citizens State Bank, 668 F.2d 444, 446 (8th Cir. 1982); United States v. Rose, 549 F.Supp. 830, 832 (S.D.N.Y. 1982); Underwood v. Pierce, 547 F.Supp. 256, 260 (C.D. Cal. 1982); see Fitzgerald v. Hampton, 545 F. Supp. 53, 55-56. (D.D.C. 1982).

50/ E.g., Rule 26 of the Rules of the U.S. Court of Appeals for the Fifth Circuit.

51/ See e.g., National Ass'n of Concerned Veterans v. Sec'y of Defense, 675 F.2d 1319 (D.C. Cir. 1982); Furtado v. Bishop, 635 F.2d 915 (1st Cir. 1980); Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp., 540 F.2d 102 (3rd Cir. 1976) (Lindy II); Kerr v. Screen Extras Guild, Inc., 526 F.2d 67 (9th Cir. 1975), cert. denied, 425 U.S. 951 (1976).

52/ Conference Report, supra, at 15, reprinted in [1980] U.S. CODE CONG. & AD. NEWS 4994.

53/ E.g., Hoang Ha v. Schweiker, 541 F.Supp. 711, 714 (N.D. Cal., 1982); Moholland v. Schweiker, 546 F.Supp. 383, 387 (D.N.H. 1982); Costantino v. United States, 536 F. Supp. 60, 64 (E.D. Pa. 1982).

The fee award in Greater Los Angeles Council on Deafness, Inc. v. Community Television of Souther California, No. 78-4715(R) (C.D. Cal., Feb. 11, 1982), worked out to $260 per hour. That award was made under both the EAJA and § 505(a)(6) of the Rehabilitation Act of 1973, so it probably should not be viewed as indicative of potential EAJA awards.

54 See Hornal v. Schweiker, 551 F. Supp. 612, 615-617 (M.D. Tenn. 1982); Coleman v. HUD, No. 81 C 1284 (N.D. Ill. Sept. 7, 1982); but see Cornella v. Schweiker, 553 F. Supp. 240, 245-246 (D. S.D. 1982) (no fees "incurred" under EAJA by public interest lawyer); Kinne v. Schweiker, No. 80-81 (D. Vt. June 30, 1981) (legal aid clinic not effected by economic incentives or deterrents, so not within congressional purpose of EAJA and not entitled to fees).

55/ This issue will be of declining significance, of course, as time passes. But if Congress does not extend the EAJA beyond its current October 1, 1984 expiration date, the question will arise whether post-effective date fees can be recovered. That is one of the few EAJA questions with which this handbook will not concern itself.

On a related question, the Court of Appeals in Tyler Business Services, Inc. v. NLRB, 695 F.2d 73, 76-77 (4th Cir. 1982) concluded that the court could not award fees for administrative proceedings occurring before the effective date of the EAJA, since those proceedings were not "pending" at that time.

56/ The leading decision on this question was Photo Data, Inc. v. Sawyer, 533 F.Supp. 348, 350-51 (D.D.C. 1982). Other decisions reaching the same result include National Resources Defense Council, Inc. v. EPA, No. 81-2068 (3d Cir., March 23,

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1983), slip op. at 27-28; Tyler Business Services, Inc. v. NLRB, 695 F.2d 73, 77 (4th Cir. 1982); Heydt v. Citizens State Bank, 668 F.2d 444 (8th Cir. 1982); Kinzley v. United States, 661 F.2d 187, 193 (Ct. Cl. 1981); Underwood v. Pierce, 547 F.Supp. 256, 259-260 (C.D. Cal. 1982); Moholland v. Schweiker, 546 F. Supp. 383, 385 (D.N.H. 1982); Nunes-Correia v. Haig, 543 F.Supp. 812, 815 (D.D.C. 1982); Kennedy v. United States, 542 F.Supp. 1046, 1048 (D.N.H. 1982); Globe, Inc. v. United States, 553 F. Supp. 7, 9-10 (D.D.C. 1982); Fitzgerald v. Hampton, 545 F. Supp. 53, (D.D.C. 1982); Wolverton v. Schweiker, 533 F.Supp. 420, 423 (D. Idaho 1982); Matthews v. United States, 526 F.Supp. 993, 1008 (M.D. Ga. 1981); Muth v. Marsh, 525 F.Supp. 604, 609 (D.D.C. 1982).

One District Court has refused under the EAJA to award fees for the period before October 1, 1981. In Allen v. United States, 547 F.Supp. 357 (N.D. Ill. 1982).

57/ See "First Payment May Be Near Under the Equal Justice Act," National L.J., Jan. 24, 1983, p. 6.

58/ Equal Access to Justice: Hearings Before the Subcomm. on Agency Administration of the Senate Judiciary Comm., 97th Cong., 2d Sess. (Dec. 9, 1982), at 29-30 (prepared statement of Assistant Attorney General J. Paul McGrath) [hereinafter cited as Equal Access Hearings (December)].

59/ Pub. L. 96-481, 94 Stat. 2325, §203 (1980), amending §504 of Title 5 of the U.S. Code.

60/ 46 Fed. Reg. 32900-15 (1981). The EAJA instructed the Administrative Conference to undertake that chore. 5 U.S.C. §504(c)(1).

61/ ACUS Annual Report on the EAJA, supra, at 3. A listing of EAJA regulations, by agency, appears in Appendix D.

62/ House Report, supra, at 15, reprinted in [1980] U.S. CODE CONG. & AD. NEWS 4994.

63/ Equal Access Hearings (December), supra, at 288 (Statement of John Pachter).

64/ ACUS Annual Report on the EAJA, supra, p. 5 (Agriculture Department, 7 C.F.R. § 1.183; U.S. Postal Service, 39 C.F.R. §960.3; National Aeronautics and Space Administration; Labor Department, 29 C.F.R. §16.104).

65/ E.g., Brand S. Roofing, ASBCA No. 24688, 82-1 BCA (CCH) ¶15,717, on recon., 82-2 BCA (CCH) ¶15,935. (Armed Services Board of Contract Appeals); see Jack Faucett Assoc., Inc., GSBCA No. 5443-R, 81-1 BCA (CCH) ¶14,936 (General Services Admin.).

66/ Claude C. Wood Co., AGBCA No. 79-176-1, 82-2 BCA (CCH) ¶15,999 (1982) (Department of Agriculture); Stephens Associates, PSBCA No. 933, 82-2 BCA (CCH) ¶16,043 (1982) (Postal Service).

67/ 41 U.S.C. §§ 607(a), 609(1).

68/ The Model Rules also specify that a sole owner of an incorporated business must include both business and personal assets in meeting the $5 million limit. Model Rules, § 0.104(b)(2), 46 Fed. Reg. 32912.

69/ B.H.L. Manufacturing, Inc., No. 25-CA-11155(E) (NLRB May 4, 1982) (Supplemental Decision) (applying 29 C.F.R. §102.143(g)).

70/ American Fed. of Musicians, Local No. 76, No. 19-CC-1351(E) (NLRB July 22, 1982) (Supplemental Decision).

71/ Id. at 7.

72/ Offshore Drilling and Allied Workers Division of the Nat'l Maritime U. of America, No. 31-CB-3586(E) (NLRB March 31, 1982).

73/ Model Rules, § 0.202(a), 46 Fed. Reg. 32913.

74/ Id. § 0.202(b), 46 Fed. Reg. 32914.

75/ Id., § 0.204(a), 46 Fed. Reg. 32914.

76/ OSHRC No. 81-10S (Apr. 6, 1982).

77/ AGBCA No. 79-176-1, 82-2 BCA ¶ 15,999 (1982).

78/ Quikey Manufacturing Co., No. 8-CA-14013(E) (NLRB Aug. 26, 1982) (Supplemental Decision).

79/ Wendler v. Helms, No. 1-EAJA-SE-4887 (NTSB June 14, 1982).

80/ 5 U.S.C. §504(a)(1); see pp. 16-28, supra.

81/ Model Rules, § 0.105(a), 46 Fed. Reg. 32913 (emphasis supplied).

82/ OSHRC No. 80-1463 (Apr. 26, 1982), at 8.

83/ Wendler v. Helms, No. 1-EAJA-SE-4887 (NTSB June 14, 1982), at 15.

84/ In the preparation of this handbook, eighteen administrative decisions applying the substantial justification standard were reviewed. Fifteen of those decisions -- or over 80 percent -- found that the government's losing position was substantially justified.

85/ Hocking Valley Steel Erectors, Inc. v. Secretary of Labor, OSHRC No. 80-1463 (Apr. 26, 1982), at 10-14; Wendler v. Helms, No. 1-EAJA-SE-4887 (NTSB June 14, 1982), at 17; Revocation of License of Mencia, PR No. 81-220 (FCC Apr. 29, 1982) (Initial Decision), at 5.

86/ B.A.B. Metal Fabricators v. Secretary of Labor, OSHRC No. 81-10S (Apr. 6, 1982), at 4-5; Catskill Airways, Inc., NTSB No. 2-EAJA (Mar. 26, 1982), at 3-4; Eudell Watts, III, No. 33-CA-5163(E) (NLRB, Aug. 27, 1982); Midwestern Builders, Inc, No. 8-CA-14351E (NLRB, May 26, 1982).

87/ Koba Associates, Inc., No. 5-CA-12548 (NLRB Apr. 23, 1982), at 2.

88/ American Fed. of Musicians, Local No. 76, No. 19-CC-1351(E) (NLRB July 22, 1982) (Supplemental Decision), at 9; U.S. Coast Guard v. Hitt, No. 05-0006-PAF-82 (Coast Guard, July 21, 1982), at 8.

89/ Brand S. Roofing Co., ASBCA No. 24688, 82-1 BCA (CCH) ¶15,717; K-Mor Constr. Co., Inc., ASBCA No. 23397-d, 82-1 BCA (CCH) ¶15,954.

90/ No. 21-CA-19581(E) (NLRB May 27, 1982) (Supplemental Decision), at 8, rev'd on other grounds, 265 NLRB No. 12 (1982).

91/ No. 27-CA-6503(E) (NLRB May 19, 1982), p. 3, rev'd on other grounds, 265 NLRB No. 136 (1982).

92/ No. 5-EAJA-5988 (NTSB Sept. 23, 1982).

93/ 5 U.S.C. § 504(a)(3); Model Rules, § 0.105(b), 46 Fed. Reg. 32913. The EAJA also requires that any action to reduce or deny a fee award for delay "shall include written findings and conclusions and the reason or basis therefor." 5 U.S.C. §504(a)(3).

94/ Sottile v. Helms, No. 5-EAJA-5988 (NTSB Sept. 23, 1982), at 2.

95/ The NLRB thereby overturned ALJ rulings that the three-day extension should apply to EAJA applications. E.g., American Federation of Musicians, Case 19-CC-1351(E) (NLRB, July 22, 1982) (Supplemental Decision); Columbia Mfg. Co., No. 21-CA-19581(E) (NLRB May 27, 1982) (Supplemental Decision); rev'd, 265 NLRB No. 12 (1982).

96/ S.O. Jennings Constr. Corp. v. Secretary of Labor, No. 79-69 (OSHRC, Apr. 21, 1982).

97/ The NLRB has declined to initiate a rulemaking to raise the $75 an hour figure. Columbia Mfg. Corp., 262 NLRB No. 4 (1982).

98/ Columbia Mfg. Corp., No. 21-CA-19581(E) (NLRB May 27, 1982) (Supplemental Decision), rev'd on other grounds, 265 NLRB No. 12 (1982).

99/ Haynes-Trane Service Agency, Inc., No. 27-CA-6503(E) (NLRB May 19, 1982) rev'd on other grounds, 265 NLRB No. 136 (1982); Columbia Mfg. Corp., No. 21-CA-19581(E) (NLRB May 27, 1982) (Supplemental Decision), rev'd on other grounds, 265 NLRB No. 12 (1982).

100/ Fidelity Constr. Co., Inc., 82-1 BCA (CCH) ¶15,633 (1982); Wendler v. Helms, No. 1-EAJA-SE-4887 (NTSB June 14, 1982).

101/ Model Rules, §0.308, 46 Fed. Reg. 32915.

102/ ACUS Annual Report on the EAJA, supra, p. 5.

APPENDIX A

TITLE II—EQUAL ACCESS TO JUSTICE ACT

Equal Access to Justice Act.

SEC. 201. This title may be cited as the "Equal Access to Justice Act". 5 USC 504 note.

FINDINGS AND PURPOSE

SEC. 202. (a) The Congress finds that certain individuals, partnerships, corporations, and labor and other organizations may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights in civil actions and in administrative proceedings. 5 USC 504 note.

(b) The Congress further finds that because of the greater resources and expertise of the United States the standard for an award of fees against the United States should be different from the standard governing an award against a private litigant, in certain situations.

(c) It is the purpose of this title—

(1) to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations an award of attorney fees, expert witness fees, and other costs against the United States; and

(2) to insure the applicability in actions by or against the United States of the common law and statutory exceptions to the "American rule" respecting the award of attorney fees.

AWARD OF FEES AND OTHER EXPENSES IN CERTAIN AGENCY ACTIONS

SEC. 203. (a)(1) Subchapter I of chapter 5 of title 5, United States Code, is amended by adding at the end thereof the following new section:

"§ 504. Costs and fees of parties 5 USC 504.

"(a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency as a party to the proceeding was substantially justified or that special circumstances make an award unjust.

"(2) A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from any attorney, agent, or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the agency was not substantially justified. Application for fees and expenses, submittal.

"(3) The adjudicative officer of the agency may reduce the amount to be awarded, or deny an award, to the extent that the party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy. The decision of the adjudicative officer of the agency under this section shall be made a part of the record containing the final decision of the agency and shall include written findings and conclusions and the reason or basis therefor.

"(b)(1) For the purposes of this section— Definitions.

"(A) 'fees and other expenses' includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees (The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved, and (ii) attorney or agent fees shall not be awarded in excess of $75 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee.);

5 USC 551. "(B) 'party' means a party, as defined in section 551(3) of this title, which is an individual, partnership, corporation, association, or public or private organization other than an agency, but excludes (i) any individual whose net worth exceeded $1,000,000 at the time the adversary adjudication was initiated, and any sole owner of an unincorporated business, or any partnership, corporation, association, or organization whose net worth exceeded $5,000,000 at the time the adversary adjudication was initiated, except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of the Code and a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association, and (ii) any sole owner of an unincorporated business, or any partnership, corporation, association, or organization, having more than 500 employees at the time the adversary adjudication was initiated;

26 USC 501.

5 USC 554. "(C) 'adversary adjudication' means an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license; and

"(D) 'adjudicative officer' means the deciding official, without regard to whether the official is designated as an administrative law judge, a hearing officer or examiner, or otherwise, who presided at the adversary adjudication.

"(2) Except as otherwise provided in paragraph (1), the definitions provided in section 551 of this title apply to this section.

Applications, uniform procedures. "(c)(1) After consultation with the Chairman of the Administrative Conference of the United States, each agency shall by rule establish uniform procedures for the submission and consideration of applications for an award of fees and other expenses. If a court reviews the underlying decision of the adversary adjudication, an award for fees and other expenses may be made only pursuant to section 2412(d)(3) of title 28, United States Code.

Fee determination, review. "(2) A party dissatisfed with the fee determination made under subsection (a) may petition for leave to appeal to the court of the United States having jurisdiction to review the merits of the underlying decision of the agency adversary adjudication. If the court denies the petition for leave to appeal, no appeal may be taken from the denial. If the court grants the petition, it may modify the determination only if it finds that the failure to make an award, or the calculation of the amount of the award, was an abuse of discretion.

"(d)(1) Fees and other expenses awarded under this section may be paid by any agency over which the party prevails from any funds made available to the agency, by appropriation or otherwise, for such purpose. If not paid by any agency, the fees and other expenses shall be paid in the same manner as the payment of final judgments is made pursuant to section 2414 of title 28, United States Code.

"(2) There is authorized to be appropriated to each agency for each of the fiscal years 1982, 1983, and 1984, such sums as may be necessary to pay fees and other expenses awarded under this section in such fiscal years. Appropriation authorization.

"(e) The Chairman of the Administrative Conference of the United States, after consultation with the Chief Counsel for Advocacy of the Small Business Administration, shall report annually to the Congress on the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this section. The report shall describe the number, nature, and amount of the awards, the claims involved in the controversy, and any other relevant information which may aid the Congress in evaluating the scope and impact of such awards. Each agency shall provide the Chairman with such information as is necessary for the Chairman to comply with the requirements of this subsection.". Report to Congress.

(2) The table of sections of subchapter I of chapter 5 of title 5, United States Code, is amended by adding at the end thereof the following new item:

"504. Costs and fees of parties.".

(b) Section 202 of the Act entitled "An Act to amend the Small Business Act and Small Business Investment Act of 1958 to provide additional assistance under such Acts, to create a pollution control financing program for small business, and for other purposes" approved June 4, 1976 (15 U.S.C. 634b), is amended—

(1) by striking out "and" after the semicolon in paragraph (9);

(2) by striking out the period at the end of paragraph (10) and inserting in lieu thereof a semicolon and "and"; and

(3) by adding at the end thereof the following new paragraph:

"(11) advise, cooperate with, and consult with, the Chairman of the Administrative Conference of the United States with respect to section 504(e) of title 5 of the United States Code.". *Ante*, p. 2325.

(c) Effective October 1, 1984, section 504, and the item relating to section 504 in the table of sections, of title 5, United States Code, as added by subsection (a) of this section, are repealed, except that the provisions of such section shall continue to apply through final disposition of any adversary adjudication as defined in subsection (b)(1)(C) of such section, initiated before the date of repeal. Repeal. 5 USC 504.

AWARD OF FEES AND OTHER EXPENSES IN CERTAIN JUDICIAL PROCEEDINGS

SEC. 204. (a) Section 2412 of title 28, United States Code, is amended to read as follows:

"§ 2412. Costs and fees

"(a) Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency and any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States 28 USC 1920.

shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation.

"(b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency and any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

Judgment payments.

"(c)(1) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for costs pursuant to subsection (a) shall be paid as provided in sections 2414 and 2517 of this title and shall be in addition to any relief provided in the judgment.

28 USC 2414, 2517.

"(2) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for fees and expenses of attorneys pursuant to subsection (b) shall be paid as provided in sections 2414 and 2517 of this title, except that if the basis for the award is a finding that the United States acted in bad faith, then the award shall be paid by any agency found to have acted in bad faith and shall be in addition to any relief provided in the judgment.

"(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort) brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

Fee and expense applications, submittal.

"(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified.

Awards, reduction or denial.

"(C) The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

Definitions.

"(2) For the purposes of this subsection—

"(A) 'fees and other expenses' includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the

highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);

"(B) 'party' means (i) an individual whose net worth did not exceed $1,000,000 at the time the civil action was filed, (ii) a sole owner of an unincorporated business, or a partnership, corporation, association, or organization whose net worth did not exceed $5,000,000 at the time the civil action was filed, except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of the Code and a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association, or (iii) a sole owner of an unincorporated business, or a partnership, corporation, association, or organization, having not more than 500 employees at the time the civil action was filed; and

"(C) 'United States' includes any agency and any official of the United States acting in his or her official capacity.

"(3) In awarding fees and other expenses under this subsection to a prevailing party in any action for judicial review of an adversary adjudication, as defined in subsection (b)(1)(C) of section 504 of title 5, United States Code, or an adversary adjudication subject to the Contract Disputes Act of 1978, the court shall include in that award fees and other expenses to the same extent authorized in subsection (a) of such section, unless the court finds that during such adversary adjudication the position of the United States was substantially justified, or that special circumstances make an award unjust.

Ante, p. 2325.
41 USC 601 note.

"(4)(A) Fees and other expenses awarded under this subsection may be paid by any agency over which the party prevails from any funds made available to the agency, by appropriation or otherwise, for such purpose. If not paid by any agency, the fees and other expenses shall be paid in the same manner as the payment of final judgments is made in accordance with sections 2414 and 2517 of this title.

28 USC 2414, 2517.

"(B) There is authorized to be appropriated to each agency for each of the fiscal years 1982, 1983, and 1984, such sums as may be necessary to pay fees and other expenses awarded pursuant to this subsection in such fiscal years.

Appropriation authorization.

"(5) The Director of the Administrative Office of the United States Courts shall include in the annual report prepared pursuant to section 604 of this title, the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this subsection. The report shall describe the number, nature, and amount of the awards, the claims involved in the controversy, and any other relevant information which may aid the Congress in evaluating the scope and impact of such awards.".

Report to Congress.
28 USC 604.

(b) The item relating to section 2412 in the table of sections for chapter 161 of title 28, United States Code, is amended to read as follows:

"2412. Costs and fees.".

(c) Effective October 1, 1984, subsection (d) of section 2412, as added by subsection (a) of this section, is repealed, except that the provisions of that subsection shall continue to apply through final disposition of any action commenced before the date of repeal.

28 USC 2412.

TECHNICAL AND CONFORMING AMENDMENTS

Repeal.
28 USC app.

SEC. 205. (a) Subdivision (f) of rule 37 of the Federal Rules of Civil Procedure is repealed.

(b) The table of rules of the Federal Rules of Civil Procedure is amended by deleting the item relating to subdivision (f) of rule 37.

(c) Section 722 of the Revised Statutes (42 U.S.C. 1988) is amended by striking out "or in any civil action or proceeding by or on behalf of the United States of America, to enforce, or charging a violation of a

26 USC 1.

provision of the United States Internal Revenue Code,".

EFFECT ON OTHER LAWS

28 USC 2412 note.
Ante, p. 2327.

SEC. 206. Nothing in section 2412(d) of title 28, United States Code, as added by section 204(a) of this title, alters, modifies, repeals, invalidates, or supersedes any other provision of Federal law which authorizes an award of such fees and other expenses to any party other than the United States that prevails in any civil action brought by or against the United States.

LIMITATION

5 USC 504 note.

SEC. 207. The payment of judgments, fees and other expenses in the same manner as the payment of final judgments as provided in this Act is effective only to the extent and in such amounts as are provided in advance in appropriations Acts.

EFFECTIVE DATE AND APPLICATION

5 USC 504 note.

SEC. 208. This title and the amendments made by this title shall take effect of October 1, 1981, and shall apply to any adversary adjudication, as defined in section 504(b)(1)(C) of title 5, United States

Ante, p. 2325.

Code, and any civil action or adversary adjudication described in section 2412 of title 28, United States Code, which is pending on, or commenced on or after, such date.

APPENDIX B

TAX EQUITY & FISCAL RESPONSIBILITY

LAWS OF 97th CONG.-2nd SESS.

SEC. 292. AWARDING OF COSTS AND CERTAIN FEES.

(a) IN GENERAL.—Subchapter B of chapter 76 (relating to proceedings by taxpayers and third parties) is amended by redesignating section 7430 as section 7431 and by inserting after section 7429 the following new section:

"SEC. 7430. AWARDING OF COURT COSTS AND CERTAIN FEES.

"(a) IN GENERAL.—In the case of any civil proceeding which is—

"(1) brought by or against the United States in connection with the determination, collection, or refund of any tax, interest, or penalty under this title, and

"(2) brought in a court of the United States (including the Tax Court),

the prevailing party may be awarded a judgment for reasonable litigation costs incurred in such proceeding.

"(b) LIMITATIONS.—

"(1) MAXIMUM DOLLAR AMOUNT.—The amount of reasonable litigation costs which may be awarded under subsection (a) with respect to any prevailing party in any civil proceeding shall not exceed $25,000.

"(2) REQUIREMENT THAT ADMINISTRATIVE REMEDIES BE EXHAUSTED.—A judgment for reasonable litigation costs shall not be awarded under subsection (a) unless the court determines that the prevailing party has exhausted the administrative

remedies available to such party within the Internal Revenue Service.

"(3) ONLY COSTS ALLOCABLE TO THE UNITED STATES.—An award under subsection (a) shall be made only for reasonable litigation costs which are allocable to the United States and not to any other party to the action or proceeding.

"(4) EXCLUSION OF DECLARATORY JUDGMENT PROCEEDINGS.—

"(A) IN GENERAL.—No award for reasonable litigation costs may be made under subsection (a) with respect to any declaratory judgment proceeding.

"(B) EXCEPTION FOR SECTION 501(c)(3) DETERMINATION REVOCATION PROCEEDINGS.—Subparagraph (A) shall not apply to any proceeding which involves the revocation of a determination that the organization is described in section 501(c)(3).

"(c) DEFINITIONS.—For purposes of this section—

"(1) REASONABLE LITIGATION COSTS.—

"(A) IN GENERAL.—The term 'reasonable litigation costs' includes—

"(i) reasonable court costs,

"(ii) the reasonable expenses of expert witnesses in connection with the civil proceeding,

"(iii) the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and

"(iv) reasonable fees paid or incurred for the services of attorneys in connection with the civil proceeding.

"(B) ATTORNEY'S FEES.—In the case of any proceeding in the Tax Court, fees for the services of an individual (whether or not an attorney) who is authorized to practice before the Tax Court shall be treated as fees for the services of an attorney.

"(2) PREVAILING PARTY.—

"(A) IN GENERAL.—The term 'prevailing party' means any party to any proceeding described in subsection (a) (other than the United States or any creditor of the taxpayer involved) which—

"(i) establishes that the position of the United States in the civil proceeding was unreasonable, and

"(ii)(I) has substantially prevailed with respect to the amount in controversy, or

"(II) has substantially prevailed with respect to the most significant issue or set of issues presented.

"(B) DETERMINATION AS TO PREVAILING PARTY.—Any determination under subparagraph (A) as to whether a party is a prevailing party shall be made—

"(i) by the court, or

"(ii) by agreement of the parties.

"(3) CIVIL ACTIONS.—The term 'civil proceeding' includes a civil action.

"(d) MULTIPLE ACTIONS.—For purposes of this section, in the case of—

"(1) multiple actions which could have been joined or consolidated, or

"(2) a case or cases involving a return or returns of the same taxpayer (including joint returns of married individuals) which could have been joined in a single proceeding in the same court, such actions or cases shall be treated as one civil proceeding regardless of whether such joinder or consolidation actually occurs, unless the court in which such action is brought determines, in its discretion, that it would be inappropriate to treat such actions or cases as joined or consolidated for purposes of this section.

"(e) RIGHT OF APPEAL.—An order granting or denying an award for reasonable litigation costs under subsection (a), in whole or in part, shall be incorporated as a part of the decision or judgment in the case and shall be subject to appeal in the same manner as the decision or judgment.

"(f) TERMINATION.—This section shall not apply to any proceeding commenced after December 31, 1985.".

(b) PENALTY FOR USING TAX COURT PROCEEDINGS FOR DELAY; PENALTY FOR FRIVOLOUS OR GROUNDLESS PROCEEDING.—The first sentence of section 6673 (relating to damages assessable by instituting proceedings before the Tax Court merely for delay) is amended to read as follows: "Whenever it appears to the Tax Court that proceedings before it have been instituted or maintained by the taxpayer primarily for delay or that the taxpayer's position in such proceedings is frivolous or groundless, damages in an amount not in excess of $5,000 shall be awarded to the United States by the Tax Court in its decision.".

(c) APPLICATION WITH TITLE 28.—Section 2412 of title 28, United States Code, is amended by adding at the end thereof the following new subsection:

"(e) The provisions of this section shall not apply to any costs, fees, and other expenses in connection with any proceeding to which section 7430 of the Internal Revenue Code of 1954 applies (determined without regard to subsections (b) and (f) of such section). Nothing in the preceding sentence shall prevent the awarding under subsection (a) of section 2412 of title 28, United States Code, of costs enumerated in section 1920 of such title (as in effect on October 1, 1981).".

(d) CONFORMING AMENDMENTS.—

(1) The table of sections for subchapter B of chapter 76 is amended by striking out the item relating to section 7430 and inserting the following new items:

"Sec. 7430. Awarding of court costs and certain fees.
"Sec. 7431. Cross references.".

(2)(A) The section heading of section 6673 is amended by striking out "MERELY FOR DELAY." and inserting in lieu thereof "PRIMARILY FOR DELAY, ETC.".

(B) The table of sections for subchapter B of chapter 68 is amended by striking out "merely for delay." in the item relating to section 6673 and inserting in lieu thereof "primarily for delay, etc.".

(e) EFFECTIVE DATES.—

(1) IN GENERAL.—The amendments made by this section shall apply to civil actions or proceedings commenced after February 28, 1983.

(2) PENALTY.—The amendments made by subsections (b) and (d)(2) shall apply to any action or proceeding in the Tax Court commenced after December 31, 1982.

RAMOS v. LAMM
Cite as 539 F.Supp. 730 (1982)

APPENDIX A

FEDERAL STATUTES AUTHORIZING THE AWARD OF ATTORNEYS' FEES *

Age Discrimination Act of 1975 (as amended by Pub.L. 95–478, § 401), 42 U.S.C., § 6104(e).

Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626(b)

Agricultural Unfair Trade Practices, 7 U.S.C. § 2305(a), (c)

Alaska Native Claims Settlement Act, 43 U.S.C. § 1619

Alien Owners of Land, 48 U.S.C. § 1506

Atomic Energy Act of 1954, 42 U.S.C. § 2184

Bank Holding Company Act, 12 U.S.C. §§ 1975, 2607(d)(2)

Bankruptcy Act, 11 U.S.C. §§ 109, 205(c)(12), 632, 641, 642, 643, 644, 1975

Bankruptcy Reform Act (Pub.L. 95-598), 11 U.S.C. §§ 303(i), 330(a), 363(n), 503(b)

Civil Rights Act of 1964, Title II, 42 U.S.C. § 2000a–3(b)

Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e–5(k)

Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988

Civil Service Reform Act of 1978 (Pub.L. 95–454, §§ 205, 702), 5 U.S.C. §§ 5596(b)(1), 7701(g)

Clayton Act, 15 U.S.C. § 15

Clean Air Act (as amended by Pub.L. 95-95), 42 U.S.C. §§ 7413(b), 7604(d), 7607(f), 7622(b)(2)(B), (e)(2)

Clean Air Act Amendments of 1970, 42 U.S.C. § 1857h–2(d)

Coal Mine Safety Act, 30 U.S.C. § 938(c)

Coast Guard Act, 14 U.S.C. § 431(c)

Commodity Futures Trading Commission Act of 1974, 7 U.S.C. § 18(f), (g)

Communications Act of 1934, 47 U.S.C. §§ 206, 407

Consumer Leasing Act, 15 U.S.C. § 1667b(a)

Consumer Product Safety Act, 15 U.S.C. §§ 2059(e)(4), 2060(c), 2072(a), 2073

Copyright Act, 17 U.S.C. § 505

Criminal Code, 18 U.S.C. §§ 3006A(d), 3495

Deepwater Ports Act, 33 U.S.C. § 1515(d)

Economic Opportunity Act of 1964, 42 U.S.C. § 2701 et seq.

Electronic Fund Transfer Act (Pub.L. 95-630, Title XX), 15 U.S.C. § 1693m(a), (f)

Emergency School Aid Act of 1972, 20 U.S.C. § 1617

Employee Retirement Income Security Act, 29 U.S.C. § 1132(g)

Endangered Species Act, 16 U.S.C. § 1540(g)(4)

Energy Policy and Conservation Act, 42 U.S.C. § 6305(d)

Energy Reorganization Act of 1974 (as amended by Pub.L. 95–601), 42 U.S.C. § 5851(b)(2)(B), (e)(2)

Equal Access to Justice Act, 5 U.S.C. § 504, 28 U.S.C. § 2412

Equal Credit Opportunity Act, 15 U.S.C. § 1691e(d)

Ethics in Government Act of 1978 (Pub.L. 95–521, § 710(d), 2 U.S.C. § 288i(d)

Fair Credit Reporting Act, 15 U.S.C. §§ 1681n, o

Fair Debt Collection Practices Act (Pub.L. 95–109, § 813–(a)), 15 U.S.C. § 1692k

Fair Housing Act of 1968, 42 U.S.C. § 3612(c)

Fair Labor Standards Act, 29 U.S.C. § 216(b)

Federal Contested Election Act, 2 U.S.C. § 396

Federal Credit Union Act, 12 U.S.C. § 1786(o)

Federal Deposit Insurance Act, 12 U.S.C. § 1818(n)

Federal Employment Compensation for Work Injuries, 5 U.S.C. § 8127

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APPENDIX A—Continued

Federal Mine Safety and Health Act, 30 U.S.C. § 815(c)(3) (added by Pub.L. 95-164), 30 U.S.C. § 938(c)

Federal Power Act (as amended by Pub.L. 95-617, § 212), 16 U.S.C. § 825q1-(b)(2)

Federal Rules of Appellate Procedure, App. Rule 38 (28 U.S.C.)

Federal Rules of Civil Procedure, App. Rules 37, 56(g) (28 U.S.C.)

Federal Trade Commission Improvement Act, 15 U.S.C. §§ 57a(h)(1)

Federal Water Pollution Control Act Amendment of 1972, 33 U.S.C. § 1365(d)

Fees and Costs, 28 U.S.C. § 1912

Foreign Intelligence Surveillance Act of 1978 (Pub.L. 95 511, § 110), 50 U.S.C. § 1810

Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E)

Government in the Sunshine Act, 5 U.S.C. § 552b(i)

Guam Organic Act (Pub.L. 95 134, § 204), 48 U.S.C. § 1424c(f)

Hart-Scott Rodino Antitrust Improvements Act of 1976, 15 U.S.C. §§ 15c(a)(2), (d)(2), 26

Hobby Protection Act, 15 U.S.C. § 2102

Home Owners Loan Act of 1933, 12 U.S.C. § 1464(d)(8)

Housing and Community Development Amendments of 1979 (Pub.L. 96 153, § 405) 15 U.S.C. § 1709

Indian Claims Commission Act, 25 U.S.C. §§ 70n, 70V 3(a), (added by Pub.L. 95-69)

Indian Contract Act, 25 U.S.C. §§ 81, 82, 82(a), 85

Indian Reorganization Act, 25 U.S.C. § 476

International Claims Settlement Act, 22 U.S.C. §§ 1623(f), 1631(j), 1641(p), 1642(m), 1643(k), 1644/

Interstate Commerce Act, 49 U.S.C. §§ 8, 15(9), 16(2), 20(12), 94, 322(b)(2), 908, 1017(b)(2)

Japanese-American Evacuation Claims Act of 1948, 50 U.S.C.App. § 1985

Jewelers Hall-Mark Act, 15 U.S.C. § 298(b), (c), (d)

Jury System Improvements Act of 1978 (Pub.L. 95 572, § 6), 28 U.S.C. § 1875(d)(2)

Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 431(c), 501(b)

Legal Services Corporation Act, 42 U.S.C. § 2996e(f)

Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. §§ 399(e)(1), 928

Magnuson-Moss Warranty Act, 15 U.S.C. § 2301(d)(2)

Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. § 1415(g)(4)

Merchant Marine Act of 1936, 46 U.S.C. § 1227

Mexican-American Chamizal Convention Act of 1946, 22 U.S.C. §§ 277d-21

Military Personnel and Civilian Employees Claims Act of 1964, 31 U.S.C. § 243

Mobile Home Construction and Safety Standards Act, 42 U.S.C. §§ 5412(b)

Motor Vehicle Information and Cost Savings Act, 15 U.S.C. §§ 1918(a), 1989(a)

National Guard Act, 32 U.S.C. § 334

National Housing Act, 12 U.S.C. § 1730(m)(3)

National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1400(b)

Natural Gas Pipeline Safety Act, 49 U.S.C. § 1686(e)

Noise Control Act of 1972, 42 U.S.C. § 4911(d)

Norris-LaGuardia Act 29 U.S.C. § 107(e)

Ocean Dumping Act, 33 U.S.C. § 1415(g)(4)

Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3766(c)(4)(B)

Organized Crime Control Act of 1970, 18 U.S.C. § 1964(c)

Outer Continental Shelf Lands Act (as amended by Pub.L. 95 372), 43 U.S.C. § 1349(a)(5), (b)(2)

Packers and Stockyards Act, 7 U.S.C. § 210(f)

Patent Infringement, 35 U.S.C. § 285

Perishable Agricultural Commodities Act, 7 U.S.C. § 499g(b), (c)

Petroleum Marketing Practices Act (Pub.L. 95 297, § 105(d), 15 U.S.C. § 2805(d)(1), (3)

APPENDIX A—Continued

Plant Variety Act, 7 U.S.C. § 2565

Privacy Act, 5 U.S.C. § 522a(g)(2)(B), (3)(B), (4)

Public Utility Holding Company Act of 1935, 15 U.S.C. § 79g(d)(4), 79j(b)(2)

Public Utility Regulatory Policies Act of 1978 (Pub.L. 95-617, § 122), 16 U.S.C. § 2632(a)

Railroad Revitalization and Reform Act, 45 U.S.C. § 854(g)

Railroad Unemployment Insurance Act, 45 U.S.C. § 355(i)

Railway Labor Act, 45 U.S.C. § 153(p)

Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2607(d)

Rehabilitation Act of 1973 (as amended by Pub.L. 95-602, § 120), 29 U.S.C. § 794a(b)

Right to Financial Privacy Act of 1978 (Pub.L. 95-630, §§ 1117(a), 1118), 12 U.S.C. §§ 3417(a), 3418

Safe Drinking Water Act, 42 U.S.C. §§ 300j-8(d), 9(i)(2)(B)(ii)

Securities Act of 1933, 15 U.S.C. § 77k(e)

Securities Exchange Act of 1934, 15 U.S.C. § 78i(e), 78r(a)

Securities Investor Protection Act, 15 U.S.C. § 78eee(b) (Pub.L. 95-283, § 7(b)(5))

Servicemen's Group Life Insurance Act, 38 U.S.C. § 784(g)

Sex Discrimination Prohibition (Title IX of Pub.L. 92-318), 20 U.S.C. § 1681 et seq. See 42 U.S.C. § 1988

Social Security Act Amendments of 1965, 42 U.S.C. § 406

Solid Waste Disposal Act, 42 U.S.C. §§ 6971(c), 6972(e)

State and Local Fiscal Assistance Amendment of 1976, 31 U.S.C. § 1244(e)

Surface Mining Control and Reclamation Act (Pub.L. 95-87), 30 U.S.C. §§ 1270(d), (f), 1275(e), 1293(c)

Tax Reform Act of 1976, 26 U.S.C. § 6110(i)(2)

Toxic Substances Control Act, 15 U.S.C. §§ 2605(c)(4)(A), 2618(d), 2619(c)(2), 2620(b)(4)(C), 2622(b)(2)(B)

Trademar' Act, 15 U.S.C. § 1117

Trading With the Enemy Act, 50 U.S.C. App. § 20

Trust Indenture Act, 15 U.S.C. § 77ooo(e), www(a)

Truth in Lending Act, 15 U.S.C. § 1640(a)

Unfair Competition Act, 15 U.S.C. § 72

Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. § 4654

United States as a Party, 28 U.S.C. § 2412

Veterans' Benefits Act, 38 U.S.C. § 3404(c)

Voting Rights Amendment of 1975, 42 U.S.C. § 1973l(e)

War Hazards Compensation Act, 42 U.S.C. § 1714

Water Pollution Prevention and Control Act, 33 U.S.C. §§ 1365(d), 1367(c)

Wire Interception Act, 18 U.S.C. § 2520

APPENDIX D

EQUAL ACCESS TO JUSTICE ACT REGULATIONS

Agency	Status of Rule	Citation
Agriculture Department	Proposed Rule	47 Fed. Reg. 26611 (June 21, 1982)
Civil Aeronautics Board	Final Rule	14 C.F.R. §373, et seq.
Commerce Department	Interim Rule	47 Fed. Reg. 13509 (March 31, 1982)
Commodity Futures Trading Commission	Final Rule	17 C.F.R. §148, et seq.
Consumer Product Safety Commission	Final Rule	47 Fed. Reg. 25512 (June 14, 1982)
Environmental Protection Agency	Interim Rule	47 Fed. Reg. 16780 (April 20, 1982)
Federal Communications Commission	Final Rule	47 Fed. Reg. 3785 (Jan. 27, 1981)
Federal Deposit Insurance Corporation	Final Rule	12 C.F.R. §148, et seq.
Federal Energy Regulatory Commission	Proposed Rule	47 Fed. Reg. 4313 (Jan. 29, 1982)
Federal Home Loan Bank Board	Final Rule	12 C.F.R. §5096, et seq.
Federal Labor Relations Authority	Interim Rule	5 C.F.R. §2430, et seq.
Federal Mine Safety and Health Review Commission	Interim Rule	47 Fed. Reg. 10000 (March 9, 1982)
Federal Trade Commission	Final Rule	16 C.F.R. §3, et seq.
Health and Human Services Department	Interim Rule	47 Fed. Reg. 10834 (March 12, 1982)
International Trade Commission	Final Rule	19 C.F.R. §212, et seq.
Interstate Commerce Commission	Final Rule	46 Fed. Reg. 61659 (Dec. 18, 1981)
Justice Department	Final Rule	28 C.F.R. §24, et seq.
Labor Department	Final Rule	29 C.F.R. §16, et seq.
Merit Systems Protection Board	Proposed Rule	47 Fed. Reg. 52184 (Nov. 19, 1982)
National Aeronautics and Space Administration*/	Interim Rule	47 Fed. Reg. 3758 (Jan. 27, 1982)
National Credit Union Administration	Final Rule	12 C.F.R. §747, et seq.

*/ NASA adopted rules although it stated that it does not believe it conducts any covered proceedings.

Agency	Status of Rule	Citation
National Labor Relations Board	Final Rule	29 C.F.R. §102, et seq.
National Transportation Safety Board	Final Rule	49 C.F.R. §826, et seq.
Nuclear Regulatory Commission	Proposed Rule	46 Fed. Reg. 53189 (Oct. 28, 1981)
Occupational Safety and Health Review Commission	Final Rule	29 C.F.R. §2204, et seq.
Postal Service	Final Rule	39 C.F.R. §960, et seq.
Securities and Exchange Commission	Final Rule	47 Fed. Reg. 609 (Jan. 6, 1982)
Small Business Administration	Interim Rule	47 Fed. Reg. 22082 (May 21, 1982)
State Department	Final Rule	22 C.F.R. §134, et seq.
Transportation Department	Final Rule	49 C.F.R. §6, et seq.
Treasury Department	Final Rule	31 C.F.R. §6, et seq.

MODEL RULES

PART 0—IMPLEMENTATION OF THE EQUAL ACCESS TO JUSTICE ACT IN AGENCY PROCEEDINGS

Subpart A—General Provisions

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Authority: Sec. 203(a)(1), Pub. L. 96-481, 94 Stat. 2325 (5 U.S.C. 504(c)(1)).

Subpart A—General Provisions

0.101 Purpose of these rules.

The Equal Access to Justice Act, 5 U.S.C. 504 (called "the Act" in this part), provides for the award of attorney fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings (called "adversary adjudications") before this agency. An eligible party may receive an award when it prevails over an agency, unless the agency's position in the proceeding was substantially justified or special circumstances make an award unjust. The rules in this part describe the parties eligible for awards and the proceedings that are covered. They also explain how to apply for awards, and the procedures and standards that this agency will use to make them.

0.102 When the Act applies.

The Act applies to any adversary adjudication pending before this agency at any time between October 1, 1981 and September 30, 1984. This includes proceedings begun before October 1, 1981 if final agency action has not been taken before that date, and proceedings pending on September 30, 1984, regardless of when they were initiated or when final agency action occurs.

0.103 Proceedings covered.

(a) The Act applies to adversary adjudications conducted by this agency. These are adjudications under 5 U.S.C. 554 in which the position of this or any other agency of the United States, or any component of an agency, is presented by an attorney or other representative who enters an appearance and participates in the proceeding. Any proceeding in which this agency may prescribe a lawful present or future rate is not covered by the Act. Proceedings to grant or renew licenses are also excluded, but proceedings to modify, suspend, or revoke licenses are covered if they are otherwise "adversary adjudications." For this agency, the types of proceedings generally covered include: [Here list].

(b) This agency may also designate a proceeding not listed in paragraph (a) as an adversary adjudication for purposes of the Act by so stating in an order initiating the proceeding or designating the matter for hearing. This agency's failure to designate a proceeding as an adversary adjudication shall not preclude the filing of an application by a party who believes the proceeding is covered by the Act; whether the proceeding is covered will then be an issue for resolution in proceedings on the application.

(c) If a proceeding includes both matters covered by the Act and matters specifically excluded from coverage, any award made will include only fees and expenses related to covered issues.

0.104 Eligibility of applicants.

(a) To be eligible for an award of attorney fees and other expenses under the Act, the applicant must be a party to the adversary adjudication for which it seeks an award. The term "party" is defined in 5 U.S.C. 551(3). The applicant must show that it meets all conditions of eligibility set out in this subpart and in subpart B.

(b) The types of eligible applicants are as follows:

(1) An individual with a net worth of not more than $1 million;

(2) The sole owner of an unincorporated business who has a net worth of not more than $5 million, including both personal and business interests, and not more than 500 employees;

(3) A charitable or other tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) with not more than 500 employees;

(4) A cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)) with not more than 500 employees; and

(5) Any other partnership, corporation, association, or public or private organization with a net worth of not more than $5 million and not more than 500 employees.

(c) For the purpose of eligibility, the net worth and number of employees of an applicant shall be determined as of the date the proceeding was initiated.

(d) An applicant who owns an unincorporated business will be considered as an "individual" rather than a "sole owner of an unincorporated business" if the issues on which the applicant prevails are related primarily to personal interests rather than to business interests.

(e) The employees of an applicant include all persons who regularly perform services for remuneration for the applicant, under the applicant's direction and control. Part-time employees shall be included on a proportional basis.

(f) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual, corporation or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant, or any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate for purposes of this part, unless the adjudicative officer determines that such treatment would be unjust and contrary to the purposes of the Act in light of the actual relationship between the affiliated entities. In addition, the adjudicative officer may determine the financial relationships of the applicant other than those described in this paragraph constitute special circumstances that would make an award unjust.

(g) An applicant that participates in proceeding primarily on behalf of one more other persons or entities that would be ineligible is not itself eligible for an award.

0.105 Standards for awards.

(a) A prevailing applicant may receive an award for fees and expenses incurred in connection with a proceeding, or in a significant and discrete substantive portion of the proceeding, unless the position of the agency over which the

applicant has prevailed was substantially justified. The burden of proof that an award should not be made to an eligible prevailing applicant is on the agency counsel, which may avoid an award by showing that its position was reasonable in law and fact.

(b) An award will be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding or if special circumstances make the award sought unjust.

0.106 Allowable fees and expenses.

(a) Awards will be based on rates customarily charged by persons engaged in the business of acting as attorneys, agents and expert witnesses, even if the services were made available without charge or at a reduced rate to the applicant.

(b) No award for the fee of an attorney or agent under these rules may exceed $75.00 per hour. No award to compensate an expert witness may exceed the highest rate at which this agency pays expert witnesses, which is [$26.09 per hour]. However, an award may also include the reasonable expenses of the attorney, agent, or witness as a separate item, if the attorney, agent or witness ordinarily charges clients separately for such expenses.

(c) In determining the reasonableness of the fee sought for an attorney, agent or expert witness, the adjudicative officer shall consider the following:

(1) If the attorney, agent or witness is in private practice, his or her customary fee for similar services, or, if an employee of the applicant, the fully allocated cost of the services;

(2) The prevailing rate for similar services in the community in which the attorney, agent or witness ordinarily performs services;

(3) The time actually spent in the representation of the applicant;

(4) The time reasonably spent in light of the difficulty or complexity of the issues in the proceeding; and

(5) Such other factors as may bear on the value of the services provided.

(d) The reasonable cost of any study, analysis, engineering report, test, project or similar matter prepared on behalf of a party may be awarded, to the extent that the charge for the service does not exceed the prevailing rate for similar services, and the study or other matter was necessary for preparation of the applicant's case.

0.107 Rulemaking on maximum rates for attorney fees.

(a) If warranted by an increase in the cost of living or by special circumstances (such as limited availability of attorneys qualified to handle certain types of proceedings), this agency may adopt regulations providing that attorney fees may be awarded at a rate higher than $75 per hour in some or all of the types of proceedings covered by this part. This agency will conduct any rulemaking proceedings for this purpose under the informal rulemaking procedures of the Administrative Procedure Act.

(b) Any person may file with this agency a petition for rulemaking to increase the maximum rate for attorney fees, in accordance with [cross-reference to, or description of, standard agency procedure for rulemaking petitions.] The petition should identify the rate the petitioner believes this agency should establish and the types of proceedings in which the rate should be used. It should also explain fully the reasons why the higher rate is warranted. This agency will respond to the petition within 60 days after it is filed, by initiating a rulemaking proceeding, denying the petition, or taking other appropriate action.

0.108 Awards against other agencies.

If an applicant is entitled to an award because it prevails over another agency of the United States that participates in a proceeding before this agency and takes a position that is not substantially justified, the award or an appropriate portion of the award shall be made against that agency.

0.109 Delegations of authority.

This agency delegates to [identify appropriate agency unit or officer] authority to take final action on matters pertaining to the Equal Access to Justice Act, 5 U.S.C. 504, in actions arising under [list statutes or types of proceedings.] This agency may by order delegate authority to take final action on matters pertaining to the Equal Access to Justice Act in particular cases to other subordinate officials or bodies.

Subpart B—Information Required From Applicants

0.201 Contents of application.

(a) An application for an award of fees and expenses under the Act shall identify the applicant and the proceeding for which an award is sought. The application shall show that the applicant has prevailed and identify the position of an agency or agencies in the proceeding that the applicant alleges was not substantially justified. Unless the applicant is an individual, the application shall also state the number of employees of the applicant and describe briefly the type and purpose of its organization or business.

(b) The application shall also include a statement that the applicant's net worth does not exceed $1 million (if an individual) or $5 million (for all other applicants, including their affiliates). However, an applicant may omit this statement if:

It attaches a copy of a ruling by the Internal Revenue Service that it qualifies as an organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) or, in the case of a tax-exempt organization not required to obtain a ruling from the Internal Revenue Service on its exempt status, a statement that describes the basis for the applicant's belief that it qualifies under such section; or

(2) It states that it is a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)).

(c) The application shall state the amount of fees and expenses for which an award is sought.

(d) The application may also include any other matters that the applicant wishes this agency to consider in determining whether and in what amount an award should be made.

(e) The application shall be signed by the applicant or an authorized officer or attorney of the applicant. It shall also contain or be accompanied by a written verification under oath or under penalty of perjury that the information provided in the application is true and correct.

0.202 Net worth exhibit.

(a) Each applicant except a qualified tax-exempt organization or cooperative association must provide with its application a detailed exhibit showing the net worth of the applicant and any affiliates (as defined in § 0.104(f) of this part) when the proceeding was initiated. The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's and its affiliates' assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this part. The adjudicative officer may require an applicant to file additional information to determine its eligibility for an award.

(b) Ordinarily, the net worth exhibit will be included in the public record of the proceeding. However, an applicant that objects to public disclosure of information in any portion of the exhibit and believes there are legal grounds for withholding it from disclosure may submit that portion of the exhibit directly to the adjudicative officer in a

sealed envelope labeled "Confidential Financial Information," accompanied by a motion to withhold the information from public disclosure. The motion shall describe the information sought to be withheld and explain, in detail, why it falls within one or more of the specific exemptions from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552(b)(1)–(9), why public disclosure of the information would adversely affect the applicant, and why disclosure is not required in the public interest. The material in question shall be served on counsel representing the agency against which the applicant seeks an award, but need not be served on any other party to the proceeding. If the adjudicative officer finds that the information should not be withheld from disclosure, it shall be placed in the public record of the proceeding. Otherwise, any request to inspect or copy the exhibit shall be disposed of in accordance with this agency's established procedures under the Freedom of Information Act [insert cross reference to agency FOIA rules].

0.203 Documentation of fees and expenses.

The application shall be accompanied by full documentation of the fees and expenses, including the cost of any study, analysis, engineering report, test, project or similar matter, for which an award is sought. A separate itemized statement shall be submitted for each professional firm or individual whose services are covered by the application, showing the hours spent in connection with the proceeding by each individual, a description of the specific services performed, the rate at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity for the services provided. The adjudicative officer may require the applicant to provide vouchers, receipts, or other substantiation for any expenses claimed.

0.204 When an application may be filed.

(a) An application may be filed whenever the applicant has prevailed in the proceeding or in a significant and discrete substantive portion of the proceeding, but in no case later than 30 days after this agency's final disposition of the proceeding.

(b) If review or reconsideration is sought or taken of a decision as to which an applicant believes it has prevailed, proceedings for the award of fees shall be stayed pending final disposition of the underlying controversy.

(c) For purposes of this rule, final disposition means the later of (1) the date on which an initial decision or other recommended disposition of the merits of the proceeding by an adjudicative officer or intermediate review board becomes administratively final; (2) issuance of an order disposing of any petitions for reconsideration of this agency's final order in the proceeding; (3) if no petition for reconsideration is filed, the last date on which such a petition could have been filed; or (4) issuance of a final order or any other final resolution of a proceeding, such as a settlement or voluntary dismissal, which is not subject to a petition for reconsideration.

Subpart C—Procedures for Considering Applications

0.301 Filing and service of documents.

Any application for an award or other pleading or document related to an application shall be filed and served on all parties to the proceeding in the same manner as other pleadings in the proceeding, except as provided in § 0.202(b) for confidential financial information.

0.302 Answer to application.

(a) Within 30 days after service of an application, counsel representing the agency against which an award is sought may file an answer to the application. Unless agency counsel requests an extension of time for filing or files a statement of intent to negotiate under paragraph (b) of this section, failure to file an answer within the 30-day period may be treated as a consent to the award requested.

(b) If agency counsel and the applicant believe that the issues in the fee application can be settled, they may jointly file a statement of their intent to negotiate a settlement. The filing of this statement shall extend the time for filing an answer for an additional 30 days, and further extensions may be granted by the adjudicative officer upon request by agency counsel and the applicant.

(c) The answer shall explain in detail any objections to the award requested and identify the facts relied on in support of agency counsel's position. If the answer is based on any alleged facts not already in the record of the proceeding, agency counsel shall include with the answer either supporting affidavits or a request for further proceedings under § 0.306.

0.303 Reply.

Within 15 days after service of an answer, the applicant may file a reply. If the reply is based on any alleged facts not already in the record of the proceeding, the applicant shall include with the reply either supporting affidavits or a request for further proceedings under § 0.306.

0.304 Comments by other parties.

Any party to a proceeding other than the applicant and agency counsel may file comments on an application within 30 days after it is served or on an answer within 15 days after it is served. A commenting party may not participate further in proceedings on the application unless the adjudicative officer determines that the public interest requires such participation in order to permit full exploration of matters raised in the comments.

0.305 Settlement.

The applicant and agency counsel may agree on a proposed settlement of the award before final action on the application, either in connection with a settlement of the underlying proceeding, or after the underlying proceeding has been concluded, in accordance with the agency's standard settlement procedure. If a prevailing party and agency counsel agree on a proposed settlement of an award before an application has been filed, the application shall be filed with the proposed settlement.

0.306 Further proceedings.

(a) Ordinarily, the determination of a award will be made on the basis of the written record. However, on request of either the applicant or agency counsel, or on his or her own initiative, the adjudicative officer may order further proceedings, such as an informal conference, oral argument, additional written submissions or an evidentiary hearing. Such further proceedings shall be held only when necessary for full and fair resolution of the issues arising from the application, and shall be conducted as promptly as possible.

(b) A request that the adjudicative officer order further proceedings under this section shall specifically identify the information sought or the disputed issues and shall explain why the additional proceedings are necessary to resolve the issues.

0.307 Decision.

The adjudicative officer shall issue an initial decision on the application within [ ] days after completion of proceedings on the application. The decision shall include written finding and conclusions on the applicant's

eligibility and status as a prevailing party, and an explanation of the reasons for any difference between the amount requested and the amount awarded. The decision shall also include, if it is run, findings on whether the agency's position was substantially justified, whether the applicant unduly protracted the proceedings, or whether special circumstances make an award unjust. If the applicant has sought an award against more than one agency, the decision shall allocate responsibility for payment of any award made among the agencies, and shall explain the reasons for the allocation made.

0.308 Agency review.

Either the applicant or agency counsel may seek review of the initial decision on the fee application, or the agency may decide to review the decision on its own initiative, in accordance with [cross-reference to agency's regular review procedures.] If neither the applicant nor agency counsel seeks review and the agency does not take review on its own initiative, the initial decision on the application shall become a final decision of the agency [30] days after it is issued. Whether to review a decision is a matter within the discretion of the agency. If review is taken, the agency will issue a final decision on the application or remand the application to the adjudicative officer for further proceedings.

0.309 Judicial review.

Judicial review of final agency decisions on awards may be sought as provided in 5 U.S.C. 504(c)(2).

0.310 Payment of award.

An applicant seeking payment of an award shall submit to the [comptroller or other disbursing official] of the paying agency a copy of the agency's final decision granting the award, accompanied by a statement that the applicant will not seek review of the decision in the United States courts. [Include here address for submissions at specific agency.] The agency will pay the amount awarded to the applicant within 60 days, unless judicial review of the award or of the underlying decision of the adversary adjudication has been sought by the applicant or any other party to the proceeding.

Dated: June 12, 1981.

Reuben B. Robertson,

Chairman.

[FR Doc. 81-19032 Filed 6-24-81; 8:45 am]

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Prepared Statement of William H. Allen and Reuben B. Robertson

Mr. Chairman and Members of the Subcommittee:

The American Bar Association appreciates this opportunity to present its views on S. 919, a bill to reauthorize the Equal Access to Justice Act.

My name is William H. Allen, and I am Chairman of the Administrative Law Section of the ABA. With me today is Reuben B. Robertson, who chairs our Section's Committee on Public Advocates and Public Representation and formerly served as Chairman of the Administrative Conference of the United States. Mr. Robertson, together with Mary Candace Fowler, is also the author of a comprehensive article on the Equal Access to Justice Act which was published in Volume 56 of the Tulane Law Review, and we will be pleased to provide a copy of that article for the hearing record. We are here at the request of Morris Harrell, President of the American Bar Association.

The American Bar Association supports the Equal Access to Justice Act and favors its reauthorization. We would like first to briefly describe for you, by way of background, the specific actions taken in recent years by the Association relating to the Act and then review more specifically our positions on particular aspects of the pending bill.

Summary of ABA Actions and Policies

The ABA has long supported legislation to underwrite or shift the costs of legal representation where appropriate to achieve substantial public benefits or enforce important public rights. In February 1977 the House of Delegates of the ABA adopted a resolution endorsing the principle that attorneys' fees should be paid by the government, under proper limitations and controls, in administrative and judicial review proceedings when necessary to ensure that the interests of the public are fully and fairly represented. In February 1978 the House of Delegates adopted a further resolution on the subject, which in pertinent part reads as follows:

> "RESOLVED, that the American Bar Association supports the principle that

> reasonable attorneys' fees be included as costs recoverable by prevailing parties in more categories of civil litigation than present rules permit, when that would facilitate the use of legal remedies and services.
>
> FURTHER RESOLVED, to that end, the ABA urges the Congress of the United States promptly to enact legislation to permit courts and administrative agencies, in the interest of justice, to award as costs reasonable attorneys' fees and other expenses of litigation from public funds to a private party who substantially prevails against the federal government as a named party in a civil action or administrative proceeding, where (a) the action results in a substantial public benefit or enforces an important public right and (b) the economic interest of the party is small in comparison to the cost of effective participation, or the party does not have sufficient resources to adequately compensate counsel."

Consistent with this position, the ABA supported the enactment of the Equal Access to Justice Act in 1980. The Act established a new statutory basis upon which small businesses, individuals, nonprofit organizations and other qualified parties can recover attorneys' fees and related litigation expenses, when they prevail against the federal government in certain types of administrative and judicial proceedings.

Under the Equal Access to Justice Act, only certain types of parties are eligible to receive an award of fees or expenses from the government. Except for tax-exempt charitable or educational organizations and agricultural cooperatives, parties must meet specified maximum net worth standards to be eligible -- generally, $1,000,000 for individuals and $5,000,000 for business organizations. All entities having more than 500 employees are excluded.

The Act applies only to non-tort civil court proceedings and to "adversary adjudications" before federal agencies. "Adversary adjudications" are defined as adjudications under Section 554 of Title 5 of the United States Code -- the basic formal adjudication provision of the Administrative Procedure Act -- other than ratemaking and certain licensing proceedings, in which "the position of the United States is represented by counsel or otherwise." Fees are generally limited under the Act to $75 an hour for attorneys, and less than that for expert witnesses. Moreover, and most importantly, fees may

not be awarded under the Act if the government shows that its action was substantially justified.

The Equal Access to Justice Act took effect on October 1, 1981, and, unless extended, will expire September 30, 1984, except as to cases pending at that time.

Although the EAJA differs in some respects from the concept outlined in the ABA's 1978 resolution, it is consistent with and substantially implements the basic policy of the Association on fee-shifting in government litigation. In August, 1982 the House of Delegates reaffirmed its support for the policies underlying the Act by adopting a resolution which recommended a number of technical improvements and clarifications in the law and expresed opposition to proposals that would further restrict, limit or condition awards made under it or similar fee-shifting legislation. That resolution, which was developed and recommended by the Section of Administrative Law, states as follows:

> BE IT RESOLVED, that the American Bar Association supports proposals to amend the Equal Access to Justice Act (Public Law 96-481, October 21, 1980): (a) to provide that fee awards must be paid by the agency against which an eligible party has prevailed; (b) to conform the eligibility standards for fee awards in court proceedings to those applicable to formal agency adjudications; (c) to clarify the Act to ensure that it covers appellate proceedings seeking judicial review of agency action, not only those proceedings instituted in District Courts; (d) to clarify that fee awards may be made under the Act against agencies participating in proceedings before other agencies; (e) to cover proceedings in the United States Tax Court to the same extent as tax cases in U.S. District Courts and the Court of Claims; and (f) to raise the present unreasonable ceiling on expert witness fees to the maximum rate that may be awarded to attorneys under the Act.
>
> BE IT FURTHER RESOLVED, that the American Bar Association opposes proposals to amend the Equal Access to Justice Act, such as those in S.1223 (97th Cong., 1st Sess.), that would further restrict eligibility or make it more difficult for small businesses, individuals, nonprofit organizations and other eligible parties to obtain reimbursement of expenses arising from unjustified or unreasonable agency action, by imposing requirements (a) that a particular monetary amount have been at issue in order for an award to be made, (b) that an award be "proportionate" to the amount in controversy, or (c) that an award be based exclusively on a particular attorney's "routine and customary rates."

> BE IT FURTHER RESOLVED, that the American Bar Association opposes proposals, such as those contained in the proposed fiscal year 1983 budget, to impose arbitrary and unreasonable limits on the hourly fees for private attorneys that may be recovered from the federal government under various fee-shifting statutes.

We have attached to our prepared statement a copy of the report of the Administrative Law Section which sets out the background and reasons for these recommendations, and respectfully request that it be included in the record of this hearing.

The Board of Governors of the Association has also adopted a resolution supporting amendment of the Act to authorize the award of attorneys' fees and costs under it by agency boards of contract appeals in adjudications conducted under the Contract Disputes Act of 1978. A recent decision by the United States Court of Appeals for the Federal Circuit, in the case of Fidelity Construction Company v. United States (No. 27-82, Feb. 18, 1983), concludes definitively that contract appeal boards are not authorized to make awards under EAJA as presently written, so it appears that the matter will have to be dealt with by Congress if such relief is to be made available in those proceedings.

Finally, at its most recent meeting held in February 1983, the House of Delegates adopted a resolution strongly favoring protections to preserve the confidentiality of financial information submitted by an individual, small business or other party in connection with a fee application under the EAJA. The text of that action reads as follows:

> BE IT RESOLVED, that the American Bar Association opposes the automatic release of net worth exhibits and supporting financial information ("net worth information") submitted in conjunction with fee award applications under the Equal Access to Justice Act.
>
> AND BE IT FURTHER RESOLVED, that the American Bar Association supports procedural protections providing to those who submit net worth information the opportunity to act to ensure that such information is kept confidential by administrative agencies in administrative adjudications under the Equal Access to Justice Act. Such protections include the following:

1. An applicant objecting to the public disclosure of net worth information should have the opportunity to submit any portion of a net worth exhibit or other document ("net worth document") directly to the adjudicative officer (e.g., an administrative law judge) ruling on the fee award application in a sealed envelope labeled "Confidential Financial Information."

2. An applicant objecting to public disclosure should have the opportunity to file a motion to withhold the information from public disclosure.

3. The material in question should be served on counsel representing the agency against which the applicant seeks a fee award but need not be served on or disclosed to any other party to the proceeding.

4. If the adjudicative officer determines that the net worth information should be kept confidential and should not be disclosed, any net worth document should remain sealed, pending a subsequent request to inspect or copy the document under the Freedom of Information Act. An FOIA request pertaining to a sealed net worth document should be disposed of in accordance with the agency's established FOIA procedures.

AND BE IT FURTHER RESOLVED, that the American Bar Association urges that courts dealing with fee award applications under the Equal Access to Justice Act adopt procedures to protect the interests of applicants, where appropriate, in preserving the confidentiality of financial information submitted by them.

While that recommendation is generally addressed to agencies and the courts, we would also welcome an expression by Congress, either in legislation or committee report, urging or requiring appropriate protections for the financial information about himself that an applicant for an EAJA award must submit. We have also attached to our statement a copy of the report of the Administrative Law Section to the House of Delegates on this issue, and respectfully ask that it be included in the record.

ABA Views on S. 919

S. 919, the reauthorization bill, would make the Equal Access to Justice Act a permanent rather than a temporary law by eliminating its

automatic three-year sunset feature. This change is consistent with the ABA's views. During the first year and a half of its effectiveness, the EAJA has proved to be a relatively modest but nonetheless beneficial mechanism for promoting fairness and common-sense on the part of the government in its litigation practices.

When initial passage of the Act was under consideration, there was concern that its fee-shifting provisions would result in an inordinate budgetary drain. The Congressional Budget Office estimated in 1980 that the cost of the EAJA would be about $100 million a year, and the Office of Management and Budget estimated that the Act would cost twice as much. These fears have not been borne out in actuality. Less than $700,000 in fees and expenses was awarded in all non-tort civil litigation involving the United States government before the federal courts and no awards were made in adversary adjudications before federal agencies during the Act's first year, according to reports by the Administrative Office of the United States Courts and the Administrative Conference of the United States. This may well be because the determination that must be made before an award is permitted -- whether the government's position was "substantially justified" -- means in practice that fees will be awarded only when the government has been unfair or plainly careless in its actions. On the other hand, the EAJA does provide a useful means of redress in the event that the government is overbearing, unfair, or plainly careless in its choice of whether and how to litigate against parties of relatively modest means. Moreover, the mere threat that an award of fees could be made creates a special incentive for the agencies' litigating staffs to be fair in their positions, especially when dealing with small businesses and individuals.

In addition to making the EAJA permanent, S. 919 proposes a number of beneficial technical changes in the Act, which the American Bar Association supports:

(1) The bill would clarify the payment provisions of the Act by specifying that an award of fees and expenses "shall" be paid by the agency over which the applicant has prevailed in the litigation. The existing statutory

language states only that awards "may" be paid by agencies from funds made available "for such purpose," thus raising an undesirable degree of doubt as to whether the prevailing party can actually collect on an award.

The proposed change would not only ensure recovery by the party entitled to an award, but would also place responsibility for making that payment squarely upon the agency, which would tend to deter similar unjustified or unreasonable conduct in the future. This change is consistent with the ABA position, and we urge its adoption.

(2) The bill also resolves an ambiguity in the present statutory language as to what happens when more than one agency is involved in a case. Often, one agency may litigate a matter before another agency, as in the situation of OSHA enforcement proceedings before the Occupational Safety and Health Review Commission, and at times two or more agencies may be involved in a particular adjudicative proceeding. S. 919 makes clear that the responsibility for paying any award should be determined in the proceeding itself. Again, the ABA is on record in support of this clarification, and we urge its adoption. (We would note, however, that the reference to court in the proposed new last sentence of 5 U.S.C. 504(d)(1) should probably be changed to adjudicative office or agency, since technically a court would not be involved in such a matter at that stage.)

(3) Another change proposed in S. 919 would conform the eligibility standards for participants in judicial proceedings to those applicable to participants in administrative adjudications. As written, the EAJA now provides that parties will be eligible for awards in covered court cases if they meet either the net worth or number of employees standards, while parties appearing before agencies must meet both standards to be eligible. This appears to have been an inadvertent and unintended distinction, and the bill would amend the language to require applicants to meet both standards regardless of where the proceeding is conducted. The ABA favors this clarification.

We note, in addition, that S. 919 proposes to amend the current standards for eligbility under the EAJA by applying the $5,000,000 net worth test for the first time to Section 501(c)(3) organizations. These, of course,

are organizations that are operated for religious, charitable, scientific, public safety testing, literary or educational purposes, or for the prevention of cruelty to children or animals. Although it does not appear that a 501(c)(3) organization has ever received an award under the EAJA, the effect of the proposed amendment would be to ensure that the larger and more well established of these institutions, such as the Red Cross, the ASPCA, or the Baptist Church, should they be involved in litigation with the government, could not recover their fees even if the government's position was unreasonable or unfair. We are not aware of any pressing need for this change, and the ABA's position generally is to oppose amendments that would further restrict or limit eligibility for awards under the EAJA in appropriate cases.

(4) Section 6 of S. 919 would also repeal Section 292(a) of the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"). This provision generally removed all tax cases from the scope of the EAJA and provided a new scheme under Section 7430 of the Internal Revenue Code for the reimbursement of parties who prevail before any federal court, including the Tax Court, in tax litigation.

The ABA has been on record for many years as supporting awards of attorneys' fees in appropriate circumstances to taxpayers who prevail in disputes with the federal taxing authorities. The TEFRA provision, though diferent in some respects from the EAJA, is consistent with that ABA position. Since it is scheduled to expire in three years, Congress will necessarily have the opportunity to make corrections of any deficiencies that experience may disclose in this statutory response to the special problems of tax litigation.

In all events, the ABA's 1982 resolution favors treating Tax Court cases the same as tax litigation conducted in other federal courts with respect to fee-shifting, and the TEFRA provision is consistent with that position. Whatever the Congress decides to do with respect to the substantive standards and procedures for fee awards in tax cases, we do continue to urge that Tax Court cases be treated consistently with tax cases in other forums. Thus, if Section 292(a) of TEFRA should be repealed as proposed in S. 919, the ABA

would favor a further amendment specifying that the Tax Court is covered by the EAJA.

Conclusion

In conclusion, Mr. Chairman, the American Bar Association fully supports the objectives of the Equal Access to Justice Act. We support the bill for its reauthorization, S. 919, and a number of the technical improvements that would be accomplished by enactment of that bill. Consistent with our positions stated earlier, we would also recommend that the Subcommittee consider inclusion of hortatory or mandatory provisions to protect the confidentiality of personal financial information required to be submitted by applicants for fee awards under the EAJA, and that the United States Claims Court, the various agency boards of contract appeals, and the Tax Court (except to the extent that fees may be awarded under applicable Internal Revenue Code provisions) all be expressly included within the Equal Access to Justice provisions. The ABA continues to oppose amendments to the EAJA that would further limit eligibility or make it more difficult for small businesses, individuals, nonprofit organizations and other eligible parties to obtain reimbursement of expenses arising from unjustified or unreasonable agency action as spelled out in our August, 1982 resolution. And, as stated earlier, we do not favor Section 6 of the pending bill repealing the TEFRA provision concerning attorneys fees in tax litigation.

Again, we would like to express our appreciation for the opportunity to present the Association's views to the Subcommittee. Thank you.

20-902 O—83——9

AMERICAN BAR ASSOCIATION

SECTION OF ADMINISTRATIVE LAW

REPORT TO THE HOUSE OF DELEGATES

(August 1982)

RECOMMENDATION

The Section of Administrative Law recommends that the House of Delegates adopt the following resolution:

BE IT RESOLVED, that the American Bar Association supports proposals to amend the Equal Access to Justice Act (Public Law 96-481, October 21, 1980): (a) to provide that fee awards must be paid by the agency against which an eligible party has prevailed; (b) to conform the eligibility standards for fee awards in court proceedings to those applicable to formal agency adjudications; (c) to clarify the Act to ensure that it covers appellate proceedings seeking judicial review of agency action, not only those proceedings instituted in District Courts; (d) to clarify that fee awards may be made under the Act against agencies participating in proceedings before other agencies; (e) to cover proceedings in the United States Tax Court to the same extent as tax cases in U.S. District Courts and the Court of Claims; and (f) to raise the present unreasonable ceiling on expert witness fees to the maximum rate that may be awarded to attorneys under the Act.

BE IT FURTHER RESOLVED, that the American Bar Association opposes proposals to amend the Equal Access to Justice Act, such as those in S.1223 (97th Cong., 1st Sess.), that would further restrict eligibility or make it more difficult for small businesses, individuals, nonprofit organizations and other eligible parties to obtain reimbursement of expenses arising from unjustified or unreasonable agency action, by imposing requirements (a) that a particular monetary amount have been at issue in order for an award to be made, (b) that an award be "proportionate" to the amount

in controversy, or (c) that an award be based exclusively on a particular attorney's "routine and customary rates."

BE IT FURTHER RESOLVED, that the American Bar Association opposes proposals, such as those contained in the proposed fiscal year 1983 budget, to impose arbitrary and unreasonable limits on the hourly fees for private attorneys that may be recovered from the federal government under various fee-shifting statutes.

REPORT

I

The Equal Access to Justice Act (Public Law 96-481, October 21, 1980) establishes a new statutory basis for small businesses, individuals, nonprofit organizations and other qualified parties to recoup their attorneys' fees and other litigation expenses when they prevail against the federal government in certain types of administrative and judicial proceedings. The American Bar Association has formally endorsed legislation of this nature on several occasions in the recent past. The most notable of these actions is the Resolution adopted by the House of Delegates in February, 1978 upon the recommendation of the Consortium on Legal Services and the Public, which supports the view that attorneys' fees and litigation costs of private parties who substantially prevail over the federal government should be borne by the government where (a) the action results in a substantial public benefit or enforces an important public right and (b) the economic interest of the party is small in comparison to the cost of effective participation, or the party does not have sufficient resources to adequately compensate counsel. A year earlier, the House of Delegates approved a Resolution proposed by the Special Committee on Public Interest Practice supporting the principle that attorneys' fees should be underwritten by the government in administrative and judicial review proceedings when necessary to assure that the public interest is fully and fairly represented.

Under the Equal Access to Justice Act, only certain types of parties are eligible to receive an award. Except for tax-exempt charitable or educational organizations and agricultural cooperatives, parties must meet specified maximum net worth standards to be eligible; and entities having more than a specified number of employees are excluded. The Act applies only to non-tort civil court proceedings and to "adversary adjudications" before an agency (defined as adjudications under Section 554 of the Administrative Procedure Act, other than ratemaking and initial licensing proceedings, in which "the position of the United States is represented by counsel or otherwise"). Fees are generally limited under the Act to $75 an hour for attorneys and less for expert witnesses. Moreover, fees may not be awarded under the Act if the government shows that its action was substantially justified. Although the Act differs in some minor respects from the concept outlined in the ABA's 1978 Consortium Resolution, it is consistent with and substantially implements the ABA's basic policy on fee-shifting in government litigaton.

Unfortunately, there are a number of amibiguities, gaps and inconsistencies in the Equal Access to Justice Act that are likely to provoke unnecessary disputes and could undercut the Act's effectiveness. The first part of the proposed resolution is

designed to remedy some of these problems. These suggestions are generally consistent with the formal positions of the ABA, and with recommendations made in 1981 by the Office of the Chairman of the Administrative Conference of the United States.

(a) The Act's payment provisions do not resolve the questions of whether awards can in fact be paid and, if so, where the money will come from. Two provisions, 5 U.S.C. 504(d)(1) and 28 U.S.C. 2412(d)(4)(A), provide that fees awarded "may" be paid by agencies from funds made available "for such purpose" and, if not so paid, shall be paid from the general judgment fund established under 31 U.S.C. 714a. Section 207 of the Act, however, provides in effect that awards under the Act may not be paid from the general judgment fund unless Congress has made a specific appropriation for that purpose.

The recommendation would amend the Act to clarify that the agency whose conduct has caused an award to be made must pay it. This would not only ensure recovery by the party entitled to an award but would also place responsibility for making that payment squarely upon the agency, thereby serving as a deterrent to similar unjustified or unreasonable conduct in the future.

(b) As written, the Act provides that parties will be eligible for awards in judicial proceedings if they meet either the net worth or the number-of-employees limitation of the Act, while parties to formal agency adjudications must meet both the net worth limitation and the number-of-employees limitation to be eligible. This distinction was apparently inadvertent, since there is no indication that Congress intended the eligibility standards to be different. It appears from the legislative history that Congress intended to adopt the eligibility standard of 5 U.S.C. 504(b)(1)(B) for both types of proceedings; if so, the requirements of elibility in 28 U.S.C. 2412(d)(2)(B) should be conformed to those in 5 U.S.C. 504(b)(1)(B).

(c) 24 U.S.C. 2412(d)(1)(A) provides for the award of attorneys' fees in "any civil action (other than cases sounding in tort) brought by or against the United States. . . ." It is clear from subparagraph (d)(3) of this section that Congress at least contemplated that proceedings for judicial review of "adversary adjudications" as defined in Section 504(b)(1)(C) of the Act are covered by the term "civil action"; Congress probably intended that cases in the United States Courts of Appeals seeking judicial review of other agency actions, such as orders issued in informal adjudications and promulgation of final rules, would also be included within this category. The term "civil action" may be interpreted less inclusively, however, as in Oppenheim v. Campbell, 571 F.2d 660 (D.C. Cir. 1978), where the court held that only actions commenced by filing a complaint in court are "civil actions" for purposes of a statute of limitations provision in Title 28; the question of what appellate review proceedings are covered by the Act could result in needless litigation if Congress does not make its intention more clear.

There is, in any event, no indication of any intent by Congress to restrict the types of cases before the Courts of Appeals in which a fee award may be made, and there are ample reasons to allow eligible prevailing parties to recover their litigation costs in such cases where the government has acted unreasonably or without substantial justification. Accordingly, the recommendation proposes that 28 U.S.C. 2412(d)(1)(A) should be amended to apply explicitly to "any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States. . . ."

(d) The Act on its face may be interpreted to cover only situations in which a single agency both litigates and decides a case at the administrative level. Some statutory schemes, however, provide for one agency to litigate cases before another agency. For example, OSHA enforcement proceedings are conducted by the Department of Labor before the Occupational Safety and Health Review Commission. In addition, agencies sometimes participate voluntarily in other agencies' proceedings; examples include Department of Justice, Department of Transportation and Federal Trade Commission intervention in regulatory agency proceedings. A review of the legislative history indicates no intention by Congress to exclude these proceedings from the coverage of the Act if they otherwise fall within the statutory definition of "adversary adjudication."

To clarify that these situations are covered, the recommendation proposes that a new provision be added to 5 U.S.C. 504(a), as follows:

> If an agency participates as a party in an adversary adjudication conducted by another agency, a party who prevails against the participating agency may seek an award of fees and expenses, and the adjudicative officer may make an award against such participating agency as provided in this section.

(e) The term "court," as used in 28 U.S.C. 2412, is defined in 28 U.S.C. 451, which does not include the United States Tax Court. Thus, proceedings instituted in the Tax Court are apparently not covered by the Act, although cases in the U.S. District Courts and the Court of Claims which involve the recovery, refund or collection of internal revenue taxes are covered. There is no evident reason to treat the two types of cases differently. Moreover, since the taxpayer who receives a notice of deficiency may elect either to challenge the notice in the Tax Court or to pay the tax and sue for a refund in District Court or in the Court of Claims, this disparate treatment may cause an arbitrary shift in the respective caseloads of the various courts handling such litigation.

To correct this situation, the following new language should be added to Section 2412:

> For the purposes of this section, the term "court" shall include the United States Tax Court.

The recommendation is consistent with a Resolution adopted by the House of Delegates in February 1978, upon the recommendation of the Section of Taxation, that attorneys' fees and expenses should be awardable to prevailing private parties in Tax Court proceedings as well as tax litigation in Title 28 courts.

(f) The Act provides that awards for the services of expert witnesses may not exceed the highest rate payable by the government to such experts, which is currently $28.12 per hour. This ceiling is unreasonably low for many expert witnesses, and it is recommended to raise the cap to the $75 per hour ceiling for attorneys' fees by amending 5 U.S.C. 504(b)(1)(A) and 28 U.S.C. 2412(d)(2)(A).

II

The second part of the recommendation is directed toward proposals (such as those in S.1223 now pending before the Senate

Judiciary Committee) for amendment of the Act in ways that would further restrict eligibility or make it more difficult for small businesses, individuals, nonprofit organizations and other eligible parties to obtain reimbursement of expenses arising from unjustified or unreasonable agency action.

For example, S.1223 would impose requirements that a "pecuniary loss of $500" have been at issue in order for an award to be made, and that an award be "proportionate" to the amount in controversy. These proposals are contrary to the Act's basic remedial purposes and to the ABA's position that fee shifting should be allowed in cases where the public is benefited and when the economic interest of the prevailing party is small in comparison to the cost of effective participation.

S.1223 also would require that an award be based exclusively on a particular attorney's "routine and customary rates" rather than prevailing market rates, a proposal evidently intended to reduce or eliminate recoveries where the prevailing party is represented either by in-house counsel or by public interest or foundation lawyers, who do not customarily charge clients on a commercial fee basis. Again, this proposal undercuts the purpose of the Act and is contrary to the ABA policy supporting reimbursement for effective public interest representation in litigation against the government. The preferable apprach is that followed under other fee-shifting statutes, where rates for attorneys who have no "routine and customary rates" are set on the basis of rates ordinarily charged by attorneys of comparable experience in cases of comparable complexity. See, e.g., Rodriquez v. Taylor, 569 F.2d 1231 (3rd Cir. 1977), cert. denied, 436 U.S. 913 (1978).

The recommendation accordingly opposes these kinds of amendments to the Equal Access to Justice Act.

III

The final part of the recommendation addresses a proposal in the Administration's fiscal year 1983 budget concerning statutory fee awards against the government. This proposal would impose an arbitrary and unreasonable cap on the hourly rates that may be awarded to attorneys representing private parties in litigation by or against the government under the Equal Access to Justice Act (except for so-called "core" cases involving individuals and small businesses under that Act) or under other fee-shifting statutes such as the Freedom of Information Act, Privacy Act, Civil Rights Act of 1964, Civil Service Reform Act and Clean Air Act, among others.

The fee limit, pegged to the "mean hourly rate" paid to government attorneys plus a "constant factor" for overhead costs, would amount to $25 or $30 per hour according to press reports; it would overrule the present approach based on reasonable market rates as established in such cases as Copeland v. Marshall, 641 F.2d 880 (D.C. Cir., 1980) (en banc). The recommendation opposes this scheme, which would impose costs on private and public interest litigants (or their lawyers) who have successfully challenged illegal or unreasonable action by the government, is contrary to the remedial purposes of fee-shifting statutes, and is contrary to ABA policy, as discussed above.

Respectfully submitted

Antonin Scalia
Chairman

AMERICAN BAR ASSOCIATON

SECTION OF ADMINISTRATIVE LAW

REPORT TO THE HOUSE OF DELEGATES

(February 1983)

RECOMMENDATION

BE IT RESOLVED, that the American Bar Association opposes the automatic release of net worth exhibits and supporting financial information ("net worth information") submitted in conjunction with fee award applications under the Equal Access to Justice Act.

AND BE IT FURTHER RESOLVED, that the American Bar Association supports procedural protections providing to those who submit net worth information the opportunity to act to ensure that such information is kept confidential by administrative agencies in administrative adjudications under the Equal Access to Justice Act. Such protections include the following:

1. An applicant objecting to the public disclosure of net worth information should have the opportunity to submit any portion of a net worth exhibit or other document ("net worth document") directly to the adjudicative officer (e.g, an administrative law judge) ruling on the fee award application in a sealed envelope labeled "Confidential Financial Information."

2. An applicant objecting to public disclosure should have the opportunity to file a motion to withhold the information from public disclosure.

3. The material in question should be served on counsel representing the agency against which the applicant seeks a fee award but need not be served on or disclosed to any other party to the proceeding.

4. If the adjudicative officer determines that the net worth information should be kept confidential and should not be disclosed, any net worth document should remain sealed, pending a subsequent request to inspect or copy the document under the Freedom of Information Act. An FOIA request pertaining to a sealed net worth document should be disposed of in accordance with the agency's established FOIA procedures.

AND BE IT FURTHER RESOLVED, that the American Bar Association urges that courts dealing with fee award applications under the Equal Access to Justice Act adopt procedures to protect the interests of applicants, where appropriate, in preserving the confidentiality of financial information submitted by them.

REPORT

The Committee on Labor and Employment Law of the Administrative Law Section made a study of the confidentiality of certain financial information that must be submitted by applicants for the reimbursement of attorneys' fees and expenses under the Equal Access to Justice Act, in response to regulations of the Department of Labor that seemed insensitive to legitimate interests in confidentiality. On the basis of the Committee's report, the Council of the Section adopted a Recommendation addressed to agencies (and the courts) generally,

voicing the concerns the Committee had expressed in respect of the Labor Department specifically.

I. The Equal Access to Justice Act

The Equal Access to Justice Act requires administrative agencies as well as courts, under certain conditions, to award legal fees and other expenses to qualifying private parties that prevail in adversary adjudications against the Government. Pub. L. No. 96-481, Title II, 94 Stat. 2325, 5 U.S.C. § 504. To qualify for a fee award, the prevailing party, inter alia, must not be (1) an individual whose net worth is in excess of $1,000,000 or (2) an unincorporated business, partnership, corporation, association, or organization whose net worth is in excess of $5,000,000. 5 U.S.C. § 504(b)(1)(B) (West Supp. 1982).

The term "net worth" is not defined in the Equal Access to Justice Act itself. The committee reports accompanying the Act state only that net worth "is calculated by subtracting total liabilities from total assets. In determining the value of assets, the cost of acquisition rather than fair market value should be used." S. Rep. No. 253, 96th Cong., 1st Sess. 17 (1979); H.R. Rep. No. 1418, 96th Cong., 2d Sess. 15 (1980).

The Act requires that each agency, after consulting with the Chairman of the Administrative Conference of the United States, adopt regulations to implement the Act. 5 U.S.C. § 504(c)(1). The reason for agency consultation with the Administrative Conference is stated in the statute itself: to ensure the establishment of "uniform procedures for the submission and consideration of applications for an award of fees and other expenses." Id.

II. The ACUS Model Rule

In accordance with the congressional mandate for uniform procedures among agencies implementing the Equal Acess to Justice Act, the Administrative Conference of the United States promulgated "Model Rules," 46 Fed. Reg. 32900, June 25, 1981. In Section 0.202 of these Model Rules and the "Supplementary Information" accompanying the rules, the Administrative Conference outlined procedures for applicants to follow in order to demonstrate eligibility for Equal Acess to Justice Act awards. The Administrative Conference suggested that applicants "submit information on their net worth in a format of their own choice, whether a statement or schedule prepared for another purpose, such as a tax return or loan application, or an exhibit developed expressly for the application." Id.; see Model Rules, § 0.202(a), 46 Fed. Reg. 32913 (net worth "exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's . . . assets and liabilities and is sufficient to determine whether the applicant qualifies [for a fee award] . . . .").

The Model Rules also tackled head on a problem concerning net worth exhibits or statements that Congress had totally ignored: the question of confidentiality. In this respect, the Model Rules read as follows:

> "Ordinarily, the net worth exhibit will be included in the public record of the proceeding. However, an applicant that objects to public disclosure of information in any portion of the exhibit and believes there are legal grounds for withholding it from dis-

> closure may submit that portion of the exhibit directly to the adjudicative officer in a sealed envelope labeled 'Confidential Financial Information,' accompanied by a motion to withhold the information from public disclosure. The motion shall describe the information sought to be withheld, why it falls within one or more of the specific exemptions from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552(b)(1)-(9), why public disclosure of the information would adversely affect the applicant, and why disclosure is not required in the public interest. The material in question shall be served on counsel representing the agency against which the applicant seeks an award, but need not be served on any other party to the proceeding. If the adjudicative officer finds that the information should not be withheld from disclosure, it shall be placed in the public record of the proceeding. Otherwise, any request to inspect or copy the exhibit shall be disposed of in accordance with the agency's established procedures under the Freedom of Information Act . . . ." Model Rules § 0.202(b), 46 Fed. Reg. 32913-14.

Distilled to their essence, the Model Rules place the initial burden of keeping net worth information confidential on the applicant seeking confidential treatment. The adjudicative officer (e.g., an administrative law judge) ruling upon an applicant's motion to withhold information from public disclosure does not make a final, binding decision whether net worth information should be disclosed or protected under the Freedom of Information Act. Rather, the adjudicative officer's decision is a threshold determination. If the adjudicative officer concludes that the applicant's motion is without merit, the information becomes part of the public record and is automatically subject to disclosure. On the other hand, if the adjudicative officer concludes that the applicant's motion is meritorious, the information is merely subject to the agency's standard FOIA procedures. Such procedures, in the context of potential disclosure of arguably confidential financial information, often entail notice to the party affected by the FOIA request and an opportunity to be heard before the agency publicly disseminates any documents.

III. The NLRB's Embellishment of the Model Rule

To give its adjudicative officers added guidance in the treatment of net worth information, the National Labor Relations Board, while adopting the Administrative Conference's "net worth" Model Rules virtually in their entirety, promulgated an extra paragraph in its regulations implementing the Equal Access to Justice Act, 46 Fed. Reg. 48086 (1981). The paragraph fills in interstices of the Model Rules, as set forth below:

> "If the administrative law judge grants the motion to withhold from public disclosure, the exhibit shall remain sealed, except to the extent that its contents are required to be disclosed at hearing. The granting of the motion to withhold from public disclosure shall not be determinative of the availability of the document under the Freedom of Information Act . . . . Notwithstanding that the

> exhibit may be withheld from public disclosure, the General Counsel may disclose information from the exhibit to others if required in the course of an investigation to verify the claim of eligibility." NLRB EAJA Reg. § 102.147(g)(2), 46 Fed. Reg. 46088.

IV. The Labor Department's Regulations

After the Administrative Conference issued its Model Rules and after the NLRB issued its final regulations, the Department of Labor issued its regulations implementing the Equal Access to Justice Act, 46 Fed. Reg. 63020 (1981). While the Labor Department tracked the Model Rules with respect to the form and substance of the net worth exhibit, the Department radically departed from the confidentiality provisions of the Model Rules. The Department's regulations simply state that "[t]he net worth exhibit shall be included in the public record of the proceeding in which an award is sought." Labor Dept. EAJA Reg. § 16.202(b), 46 Fed. Reg. 63023.

The Department's explanation for the absence of a confidentiality provision in its regulations is cryptic and circular. The Department states as follows:

> "Section 16.202(b) of these regulations provides that the net worth exhibit of an applicant seeking an award shall be considered a part of the public record. This rule differs from the model rule suggested by the Administrative Conference which incorporates the Freedom of Information Act. Since, by this rule, the documents will be available to the public, the issue of disclosability under the Freedom of Information Act will not arise. 46 Fed. Reg. at 63020.

V. Discussion

The Labor Department's "per se" rule requiring the disclosure of net worth exhibits presents problems both under the Equal Access to Justice Act and the Freedom of Information Act. First and foremost, the rule is inconsistent with the spirit and purpose of the Equal Access to Justice Act itself.

The stated purpose of the Equal Access to Justice Act is "to diminish the deterrent effect of seeking review of, or defending against, government action." § 202(c), 5 U.S.C. § 504 note. The committee reports stress that the "legislation is intended to respond to a chronic problem small business owners have had contesting or challenging the unreasonable exercise of Government authority." H.R. Rep. No. 1005, 96th Cong., 2d Sess. 5 (1980); see H.R. Rep. No. 1418, 96th Cong., 2d Sess. 5-6 (1980). Thus, the raison d'etre of the Act is to encourage private parties to seek fees when they have successfully defended themselves in an administrative or judicial adjudicative action.

Automatic disclosure of net worth exhibits as contemplated by the Department of Labor's Equal Access to Justice Act regulations has the diametrically opposite effect of that intended by the Act; it discourages prevailing parties from seeking review of unreasonable governmental action. Knowing that its assets and liabilities will become a matter of public record if it seeks an award of fees under the Act, a prevailing party may well be deterred from even attempting to vindicate its position and from contesting governmental excess

to the fullest. In some circumstances, the implications of net worth disclosure to small businesses and individuals may be more onerous than simple capitulation to the government, no matter how unreasonable the government's position may be.

The Department of Labor's treatment of FOIA is also open to serious question. For example, FOIA exemption 4, 5 U.S.C. § 552(b)(4), contemplates, inter alia, that "confidential" financial information supplied to a government agency by a private party need not be the subject of public disclosure. As construed by the courts, financial information within the meaning of FOIA exemption 4 is "confidential" if disclosure is likely "(1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." E.g., National Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974).

In view of this definition of "confidentiality," it is arguable that net worth exhibits fall within the ambit of FOIA exemption 4 under certain circumstances. Disclosure of a small business' net worth to a competitor (or a labor union) could lead to the extrapolation of profit and loss data, which in turn could severely damage the business' competitive position. See generally Gulf & Western Industries, Inc. v. United States, 615 F.2d 527, 529-30 (D.C. Cir. 1979); Sterling Drug, Inc. v. FTC, 450 F.2d 698, 708-10 (D.C. Cir. 1971); Fisher v. Renegotiation Bd., 355 F. Supp. 1171, 1176 (D.D.C. 1973). At the very least, a small-business or similar applicant under the Equal Access Act can make a substantial confidentiality claim under FOIA exemption 4, and the procedures for processing its Equal Access Act application should be such as to preserve its opportunity to do so. (The opportunity is lost when documents become are part of the public record of a proceeding; such documents are obviously no longer confidential by any standard and so no longer even arguably subject to exemption 4.)

To the extent that the prevailing party seeking recompense under the Equal Access Act is an individual, disclosure of the individual's net worth exhibit may also be contrary to FOIA exemption 6. This exemption applies to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6) (emphasis added). Whether personal net worth information falls within the exemption has not been heavily litigated, but at least one court has concluded that "[t]he release of personal information such as the size of one's loan, his assets, or the collateral put up for a loan would constitute a clearly unwarranted invasion of an individual's privacy." Gregory v. Federal Deposit Insurance Corp., 470 F. Supp. 1329, 1334-35 (D.D.C. 1979), rev'd on other grounds, 631 F.2d 896 (D.C. Cir. 1980).

The Administrative Conference's Model Rules provide a logical and systematic method for assessing whether net worth exhibits should be treated as confidential. Under the Model Rules, the adjudicative officer or administrative law judge can weed out any frivolous confidentiality contentions in considering an applicant's motion to withhold information from public disclosure and any government opposition to the motion. The agency's FOIA obligations are also well protected; if the motion to withhold is granted, the agency can reconsider that decision if and when a future FOIA request is made. The Model Rules ensure a fair hearing for all interested parties.

The Model Rules' treatment of net worth exhibits has been adopted by the vast majority of the agencies promulgating

regultions under the Equal Access Act. See, e.g., 47 Fed. Reg. 3788 (1982) (FCC EAJA Reg. § 1.1512(b)); 46 Fed. Reg. 61662 (1981) (State Dept. EAJA Reg. § 134.12(b)); 46 Fed. Reg. 56783 (1981) (ITC EAJA Reg. § 212.11(b)); 46 Fed. Reg. 48082 (1981) (OSHRC EAJA Reg. § 2204.202(b)(2)).

The most powerful opposition to the Administrative Conference's Model Rules and support for the Labor Department's regulations is found in the Equal Access Act rules of the Department of Justice, 47 Fed. Reg. 15774 (1982). Like the Labor Department, the Justice Department states that "[t]he net worth exhibit shall be included in the public record of the proceeding." Justice Dept. EAJA Reg. § 24.202(c), 47 Fed. Reg. 15778. Unlike the Labor Department, the Justice Department has provided a detailed explanation of its rule, which is set forth in the "supplementary information" accompanying its Equal Access Act Regulations. 47 Fed. Reg. 15774-75.

The primary justification offered by the Justice Department for omitting a confidentiality provision (and the only one that needs extended discussion) is the effect of a confidentiality provision on potential fraudulent Equal Access Act applications. The Justice Department says that a confidentiality provision would "restrict the activities of the Department's attorneys in investigating the truth of the information contained in the net worth statement." 47 Fed. Reg. 15775. The absence of the provision "thereby assist[s] in the effort to prevent fraud on the government." Id.

The fatal flaw in the Justice Department's argument lies in its unwarranted assumption that broad-based disclosure of net worth exhibits is essential -- or even very useful -- in ferreting out fraud under the Equal Access Act. Government certification of eligibility is necessary only in the rarest of cases. There is no need to penalize those honest applicants who have legitimate and substantial reasons for wanting their net worth information kept confidential.

Any concerns about possible fraud can be alleviated by issuing a short addendum to the "net worth" regulations, as the NLRB has done. The NLRB allows limited disclosure "if required in the course of an investigation to verify the claim of eligibility." (NLRB EAJA Reg. § 102.147(a)(2), 46 Fed. Reg. 48088) (emphasis added).

William H. Allen
Chairman

February, 1983

PREPARED STATEMENT OF SALLY L. DOUGLAS

Mr. Chairman, NFIB, on behalf of its more than 505,000 small and independent business members, appreciates the opportunity to testify to our strong and enthusiastic support for the Equal Access to Justice Act, Title II of Public Law 96-481. We commend the Chairman for holding this hearing on the reauthorization of the Equal Access to Justice Act and on S. 919, as recently introduced by Senator Pete Domenici, Senator DeConcini, and yourself on March 24, 1983.

Among the various national policy issues which concern small business, interest and support for equal access legislation has been long-standing. NFIB members strongly endorsed the idea by a margin of eight to one in a Mandate poll conducted in August 1975. In 1980, the White House Conference placed a high priority on equal access. Twelve states have enacted equal access legislation and other state legislatures continue to consider such legislation. (Note Attachment on "Current Status of Equal Access Legislation in the States.").

NFIB was in the forefront as a supporter of equal access legislation. Prior to the enactment of the Equal Access to Justice Act, an unprecedented expansion had occurred in Government regulation of small business, producing a significant increase in the number of administrative and judicial proceedings brought against small businesses by government agencies. In 1977, NFIB asked its members, "During the past 24 months has any agency of the Federal Government fined your business?" Members' responses indicated that one in twenty-five small firms receive a fine in a given year. Of those firms, over 50% had accumulated fines of under $2500.

Small firms were faced with a difficult challenge if they chose to pursue any legal remedies. Extended and expensive litigation by

a small businessman against a federal agency in an adjudicatory proceeding or in a civil action against a federal agency or the United States was not economically feasible, even when the small businessman firmly believed that he was in the right. Much of the difficulty small firms faced in contesting a Government action stemmed from the predominance of the "American Rule." This rule, which can be traced back to the development of English legal principles prior to the eighteenth century, requires that each party shall bear his/her own attorneys' fees. Originally conceived to be a means of insuring that all parties would assert or protect their rights without the fear of being penalized for their actions, the "American Rule" is based on the assumption that the costs of securing or vindicating one's rights has equal economic impact on each party to a dispute. This assumption proved to be patently false for those small firms which faced the Government in a judicial action. There is no equality for small business when the opposing party is the Government. Due to economic reasons, the small businessman was to be denied his due process rights under the Fifth Amendment to the Constitution of the United States until October 1, 1981, the effective date for the Equal Access to Justice Act.

Not only would the small businessman be faced with lengthy and costly proceedings, he would also lose valuable time from his livelihood. Many small businessmen would be faced with the prospect of winning a legal fight against the Federal Government only to learn that they would then be bankrupt. It must be remembered that owners of small businesses are not wealthy people as a group. For example, the Census Bureau reported the median income of self-employed males is $1,800 less than male wage and salary earners.[1] Small entrepreneurs do not have the resources to throw away fighting the Federal Government. The Equal Access to Justice

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[1] U.S. Bureau of Census, Current Population Reports, Series P-60, No. 101, "Money Income in 1974 of Families and Persons in the United States," U.S. Government Printing Office, Washington, DC, 1976, p. 139.

Act allows small businesses to defend themselves economically against overbearing and zealous federal agencies by giving them the opportunity to recoup their attorneys' fees and other litigation expenses in court or agency litigation with the Federal Government.

The Equal Access to Justice Act provides that from October 1, 1981 to October 1, 1984, in agency adjudications in which the United States is a party, in actions for judicial review of such adjudications, and in non-tort civil actions brought by or against the United States, federal courts and federal agencies shall award attorneys' fees and expert witness fees to prevailing parties against the United States, unless the United States proves that its position as a party to the proceedings was substantially justified or that special circumstances make an award unjust. The Act covers awards for any study, analysis, engineering report, test, or project which may be necessary in building a case. Senator Pete Domenici's bill, S. 919, would repeal the termination date for the Equal Access to Justice Act.

Mr. Chairman, you have requested that we examine the provisions contained within S. 919. NFIB supports those modifications to the Equal Access to Justice Act; however, we would like this subcommittee to clarify a few of those provisions in order to strengthen the equal access law.

Since the Equal Access to Justice Act took effect on October 1, 1981, we have noted, with great interest and some degree of concern, that there have been some excessive fee awards for legal activities on behalf of a public interest group. In Greater Los Angeles Council on Deafness v. KCET, No. 78-4715R (C.D. Cal. Feb. 11, 1982), the court awarded a "reasonable" hourly fee of $175.00 (totaling $432,285), with four-fifths of the fees awarded for legal services generated prior to October 1, 1981. The Equal Access to Justice Act sets an attorney's hourly fee at $75.00; however, the law states

that a higher or lower rate may be paid if the court determines it. The court noted that this case involved "complex issues of constitutional law and statutory interpretation" which required "the skill of an exceedingly capable attorney" who undertook the case on a contingency basis.

Keeping in mind the legal decision regarding attorneys' fees in Greater Los Angeles, NFIB is concerned about the high attorneys' fees in contingency fee cases when the attorney only gets paid what he can recover from the Government. The intent of the Equal Access to Justice Act is not being upheld. The Act was originally designed to provide those private individuals and small businessmen of modest means with access to the judicial process. To permit small businesses and private individuals who were being injured the most through arbitrary and capricious Government action and regulation to pursue litigation against the Government, the limitation of income and corporation structure were included in the law.

Senate Bill 919 would amend Section 504(b)(1)(B) of Title 5 of the U.S. Code and Section 2412(d)(2)(B) of Title 28 of the U.S. Code to redefine "party" for eligibility in recovering attorneys' fees. A "party" eligible for an award of attorneys' fees for prevailing in an adversary adjudication or a judicial proceeding is defined to include: (i) an individual whose net worth does not exceed $1 million at the time the adjudication or civil action is initiated; or (ii) a partnership, corporation, association, organization, or unincorporated business owned by an individual with (1) a net worth not exceeding $5 million and (2) not more than 500 employees at the time the adjudication or civil action is commenced. Under the current law, individuals owning the unincorporated business, partnerships, corporation, association or organization must be "sole owners."

S. 919 would delete "sole," thereby conceivably clarifying our

members' standing in cases under the Equal Access to Justice Act. Under current law, for example, would a closely-held family- owned corporation experience difficulty in filing under the law? The equal access law currently contains no definition of "sole owner" but we believe the deletion of "sole" as it pertains to ownership of a business will rectify any possible confusion over standing for small business owners.

The definition of "party" under S. 919 has also been amended to permit tax exempt charitable organizations to qualify, like any partnership, corporation or association under equal access in recovering attorneys' fees, if their net worth was less than $5 million and their employees did not exceed 500.

In an effort to ensure that a Government agency's case against an individual or a small businessman is meritorious, litigation costs under Sections 504(d)(1) and 2412(d)(4)(A) will continue to be made to the prevailing party from the budget of the Government agency; however, S. 919 stipulates that "no sums may be appropriated to any such agency specifically for the purpose of paying" equal access litigation costs. NFIB strongly supports this language as a means of ensuring that agencies not "pad" their budgets and thereby provide a buffer to counteract the intent of the Act.

Since the Internal Revenue Service was the agency involved most frequently in equal access decisions by the Federal courts, NFIB is alarmed by a provision which was tucked into the comprehensive Tax Equity & Fiscal Responsibility Act of 1982 (TEFRA). Section 292(a) of the TEFRA contains an exemption for the IRS from the Equal Access to Justice Act (Section 2412 of Title 28 of U.S. Code). This TEFRA provision, which took effect on February 23, 1983, shifted the burden of proof from the Federal agency in proving justification of its case's merits to the taxpayer, who must prove that the Government's position was unreasonable.

The shifting of the burden of proof is contrary to the intent of the Equal Access to Justice Act. NFIB strongly objects to the IRS exemption as being both unwarranted and inequitable. The IRS merits no special treatment, particularly in light of clear evidence that the agency's actions are oftentimes unwarranted. For example, individuals in small tax cases are often not represented by counsel, yet recover half of the amount of the tax deficiency claimed by the Internal Revenue Service.

Two other provisions within Section 292 are of concern to small businessmen: first, Subsection b provides that the maximum award in a civil proceeding is limited to $25,000; and second, Subsection b provides that damages of up to $5,000 (up from $500) may be awarded to the United States by the Tax Court in its decision if the proceedings before the Tax Court "have been instituted or maintained by the taxpayer primarily for delay" or if the taxpayer's position in a case is "frivolous or groundless."

Equity demands that small business have recourse against the IRS, the single Federal agency impacting the universe of firms, and that the cards not be stacked against the small business owner. NFIB therefore proposes that the original intent of the Equal Access to Justice Act be reaffirmed, and that the exemption granted to the IRS within TEFRA be repealed. However, we recommend that the effective date for the repeal of Section 292(a) of TEFRA be February 23, instead of March 1, as currently stated in S. 919, so that no tax cases are permitted to slip through this loophole.

NFIB's strong concern for the inclusion of the IRS under the Equal Access to Justice Act was brought to your attention in our testimony before your subcommittee in December of 1982. NFIB supports the intent of S. 919, with the suggested modification to the Equal Access to Justice Act which specifically sets out that a prevailing party shall be awarded attorneys' fees and other expenses

for those proceedings instituted in a Tax Court. A significant number of NFIB members' cases with the IRS are instituted before the Tax Court, because the Tax Court does not require you to pay the tax liability in advance prior to adjudication. On the other hand, the U.S. District Court requires you to pay the tax, then sue for the refund. In 1981, 12.8% of the small tax cases (involving up to $5000) were decided in favor of the taxpayer.[2]

At the time of the enactment of the Equal Access to Justice Act in 1980, NFIB believed that the law was designed for those countless small businesses which file the majority of appeals at a board of contract appeals of a government department or agency. Did Congress intend in 1980 to deny the Equal Access Act's remedies to small contractors? We do not think so; however, four departments or agencies, including the Department of Agriculture, the Department of Labor, the Postal Service and the National Aeronautics and Space Administration, have issued regulations that proceedings before their board of contract appeals are not covered by the Act.

In a recent case before the Court of Appeals for the Federal Circuit, Fidelity Construction Co. v. United States, No. 27-82 (C.A. F.C. Feb. 18, 1983), the court held that Sections 203 and 204 of the Equal Access Act (5 U.S. Code Section 504 and 28 U.S. Code Section 2412) do not provide statutory authority or jurisdiction for a board of contract appeals to award attorneys' fees and other expenses. If Congress had intended the board of contract appeals to award attorneys' fees and expenses, the Court of Appeals said that "it should have included statutory language expressly so providing to satisfy the strict construction standard." NFIB therefore suggests that specific language be incorporated into the statute to extend the Act's provisions to board of contract appeals decisions.

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2 U.S. Internal Revenue Service, Commissioner and Chief Counsel for the Internal Revenue Service's 1981 Annual Report, "Tax and Litigation--Tax Court Cases," U.S. Government Printing Office, Washington, DC, 1982, p. 77.

While our members have had a continuing interest concerning the provisions of the equal access law and want the IRS, the Tax Court and boards of contract appeals to be covered by the equal access statute, we have attempted to remind them repeatedly of the contents of the law and its relevance to their business. We have found it necessary to remind them of the need to file an application for an award for fees within 30 days of a final order or decision. The Act has encouraged federal agencies to act responsibly, whether an action is instituted against a large corporate entity with an extensive legal staff or a small business which is forced to retain its own legal counsel. The legal case will either be better prepared or the case will simply not be initiated in a court or federal agency. Most assuredly, this equal access law has indeed made a significant impact even if the Act does not result in a large number of awards for small business. The ultimate result will be less wasteful enforcement of regulations and a better work product from government agencies. The performance of government regulators will be monitored closely, both by Congressional committee hearings and by the requirement under the equal access law that the annual report of the Administrative Conference of the United States be submitted to Congress. NFIB believes, as Senator Domenici pointed out in his recent floor statement, that we must always ensure that the regulators are regulated.

Current Status of Equal Access Legislation in the States
(As of April 11, 1983)

State	Ballot or Policy Position?	Legislation Introduced (Year) and/or Pending	Legislation Enacted or Executive Order (Year)
Alabama	No	No	None
Alaska	Yes	No	None
Arizona	Yes	1981	1981
Arkansas	Yes	1981	None
California	Yes	1981	1981
Colorado	Yes	1977, 1982, 1983	1977
Connecticut	Yes	1983	None
Delaware	Unknown	1983	None
Florida	Yes	1982	None
Georgia	Yes	1983	No
Hawaii	Yes	1982, 1983	No
Idaho	Yes	No	No
Illinois	Yes	1981	1981
Indiana	Yes	1981	No
Iowa	Yes	1981, 1983	None
Kansas	Yes	1980, 1981,1982	1982
Kentucky	Yes	1982	1982
Louisiana	Yes	1981, 1982	1982
Maine	Yes	1982, 1983	None
Maryland	Yes	1982, 1983	None
Massachusetts	Yes	1982, 1983	None
Michigan	1979	1981, 1983	None
Minnesota	Yes	1981, 1983	No
Mississippi	Yes	No	No
Missouri	Yes	1981, 1983	None
Montana	Yes	No	None
Nebraska	Yes	1982	1982
Nevada	Yes	No	No
New Hampshire	Yes	No	None
New Jersey	Yes	1982, 1983	None
New Mexico	Yes	1981, 1982, 1983	None
New York	Yes	1982, 1983	Vetoed 1982

State	Ballot or Policy Position?	Legislation Introduced (Year) and/or Pending	Legislation Enacted or Executive Order (Year)
North Carolina	Yes	1981, 1983	No
North Dakota	No	No	No
Ohio	Yes	Pending	No
Oklahoma	Yes	1982	1982
Oregon	Yes	1979, 1981	1981
Pennsylvania	Yes	1982	1982
Rhode Island	Yes	1983	None
South Carolina	No	No	None
South Dakota	Yes	Pending	No
Tennessee	Yes	1983	No
Texas	Yes	1981, 1983	None
Utah	No	1983	No
Vermont	Yes	1982	None
Virginia	Yes	1979, 1980, 1981	1981
Washington	Yes	No	None
West Virginia	Yes	1983	None
Wisconsin	Yes	1981, 1982, 1983	None
Wyoming	Yes	No	None

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Prepared Statement of Paralee White

My name is Paralee White. I am Vice-President of the National Association for Women Government Contractors (NAWGC). NAWGC is a non-profit membership organization representing women-owned businesses and individuals nationwide who sell to state, local, and federal government. Our primary concerns are with those government actions that affect women-owned businesses. Most women-owned businesses are small or very small. I am also an attorney in practice in Washington, D.C. Most of my clients also are small businesses. I wish to thank Senator Grassley for giving me this opportunity to testity both on behalf of NAWGC and as a practitioner on the unfortunate and unfair decisions being made as a result of the current provisions of the Equal Access to Justice Act. The reason for these decisions is that the Equal Access to Justice Act does not explicitly provide for the award of attorney fees by boards of contract appeals.

The Equal Access to Justice Act was lauded by small business when it was passed. Most small businesses saw it as a means of relief from the duress they suffered in negotiating with Government officials. That duress is obvious in any negotiation with the Government. Government officials, particularly Government attorneys, are very aware of the unequal resources at the disposal of Government. They use those resources, and the threat of those resources, to pressure small businesses not to pursue disputes with the Government. Prior to going to law school and opening my own law firm, I worked in contract administration for the General Services Administration. I saw that duress being applied first hand. For example, in consulting with the GSA lawyer advising our branch on a case I wanted to settle, I was told not to settle; that even if we couldn't win the case, we could wear them down.

Since entering private practice, I have seen this unfortunate attitude taken again and again in order to coerce

small businesses to concede claims, or in many more cases, simply drop claims against the Federal Government. For example, recently a small women-owned business attempted to collect numerous amounts due from the Government for over six months. The payments claimed ranged from $45.00 to $500.00. She also claimed interest on the amounts due pursuant to the Contract Disputes Act of 1978 (this was before the Prompt Payment Act). The Government paid the invoices but not the interest. She was told she could file a claim for the interest if she wanted. The interest totalled less than $200.00. Thus, even though the Government admitted the amount due were not in dispute and paid them in full, it circumvented the interest payment requirements by confronting the small business with lengthy board or court proceeding.

Examples in the construction industry of the Government using the cost of pursuing your rights to eliminate claims are rampant. The Corps of Engineers and other Department of Defense organizations are known for threatening to use all of the resources at their disposal if the contractor doesn't agree to drop the claim or take the Government's offer. In a recent contract, the Air Force erroneously omitted some of the work from the contract drawings. The Government attempted to get the contractor to settle for less than 1/2 of its $6600 claim based on the argument that litigation would cost the business more than the claim was worth. It is not surprising that many small businesses either don't do business with the Government or absorb their claims. I have seen a small business write off a $10,000 claim rather than pursue it because of the time and expense involved.

The Equal Access to Justice Act was intended to eliminate some of the economic deterrents to making a claim against the Federal Government. House Report No. 96-1418, September 26, 1980, to accompany S.265, proposing the Equal Access to Justice Act, stated the purpose and the reasoning behind it very clearly:

> The bill rests on the premise that certain individuals, partnerships, corporations and labor and other organizations may be deterred from seeking review of, or defending against unreasonable governmental action because of the expense involved in securing the vindication of their rights. The economic deterrents to contesting governmental action are magnified in these cases by the disparity between the resources and expertise of these individuals and their government. The purpose of the bill is to reduce the deterrents and disparity by entitling certain prevailing parties to recover an award of attorney fees, expert witness fees and other expenses against the United States, unless the Government action was substantially justified. Additionally, the bill ensures that the United States will be subject to the common law and statutory exceptions to the American rule regarding attorney fees. This change will allow a court in its discretion to award fees against the United States to the same extent it may presently award such fees against other parties.

As the Report went on to emphasize:

> For many citizens, costs of securing vindication of their rights and the inability to recover attorney fees preclude resort to the adjudicatory process. When the cost of contesting a Government order, for example, exceeds the amount at stake, a party has no realistic choice and no effective remedy. In these cases, it is more practical to endure an unjustice than to contest it.
>
> The deterrent effect created by this inability to recover fees against the Government is particularly disturbing in light of the rapid growth in Government regulations in recent years. While the influence of the bureaucracy over all aspects of life has increased, the ability of most citizens to contest any unreasonable exercise of authority has descreased. Thus, at the present time, the Government with its greater resources and expertise can in effect coerce compliance with its position. Where compliance is coerced, precedent may be established on the basis of an uncontested order rather than the thoughtful presentation and consideration of opposing views. In fact, there is evidence that small businesses are the target of agency action precisely because they do not have the resources to fully litigate the issue. This kind of truncated justice undermines the integrity of the decision-making process.

Thus, in passing the Equal Access to Justice Act, Congress fully intended to give those individuals for whom cost may be a deterrent to vindicating their rights a means to pursue that right.

The Act as currently written does not adequately reduce the deterrents and disparity as intended by Congress. The Act

explicitly provided for the court award of attorney fees. It does not provide for the board award of attorney fees. The Contract Disputes Act of 1978, included in most Government contracts, allows contractors the option of appealing Contracting Officers' decisions to the board or the Court of Claims (now the Claims Court). By providing for the award of fees at court and not boards, the Act limits the contractor's choice of a forum. The Government-harrassed contractor, of course, must choose the court in order to be awarded fees.

The Act's forcing claimants to court is very ironic in view of the Equal Access to Justice's stated intention to lessen deterrents and disparity. The boards of contract appeal traditionally have been supported as a good choice of a forum, particularly for small businesses. Board members, it has been reasoned, have valuable expertise in resolving certain claims common to their agency. They also generally are more familiar with an agency's procedures. That expertise and the less formal nature of board proceedings make boards as effective at disputes resolution as the courts. The Act, by preferring court action in the award of fees, mitigates against choosing the board.

In short, the boards of contract appeals are a viable forum for the resolution of disputes and claims. They also are an option provided for under the Contract Disputes Act of 1978. However, the same economic deterrents exist when a dispute is appealed to the boards as when it is appealed to a court. The development of the facts is as costly for presentation to the boards as it is for a court. The procuring of expert testimony is as expensive for a board as for a court. The conducting of a hearing is as expensive for a board as for a court. The same court reporter costs are incurred for a board as for a court. The same amount of legal research is necessary for the board as for the court. These are heavy expenses for any individual or business. And they are not less simply because it is a board proceeding and not a court proceeding.

The disparity in resources also affects individuals and small businesses' choice of whether or not to pursue vindication of their rights against the Government. The resources available to the Government are as overwhelming to the small business whether it appeals to the board or a court. The Government still has the resources to make the pursuit of small claims and disputes economically infeasible for the small business. As the GSA lawyer told me, the Government doesn't need to win cases, it can wear them down.

Finally, the boards themselves recognize the need to provide some relief to businesses faced with Government actions that are not substantially justified. After enactment of the Act, the issue of whether the boards could award attorney fees was heard at several boards. The Armed Services Board of Contract Appeals, the Agriculture Board of Contract Appeals, and the Postal Service Board of Contract Appeals each held that the Board could award attorney fees. The basis for the reasoning generally was that the Contract Disputes Act of 1978 gives the Board the authority to grant any relief that would be available to a litigant asserting a claim in the Court of Claims.

A recent decision by the U.S. Court of Appeals for the Federal Circuit, however, held that boards can't award fees under the Equal Access to Justice Act (Fidelity Construction Company v. U.S., CA FC No.27-82, 2/18/83). The Court based its decision entirely on the fact that the Act did not explicitly provide for award by the boards. Reasoning that any congressional waiver of sovereign immunity for an award of attorney fees must be "explicitly and unequivocally provided," the Court stated:

> If the EAJA empowered the board of contract appeals to award attorney fees, we would find this grant of authority in a specific statutory provision of that Act. We cannot extend by implication the list of forums which are authorized to award fees under the EAJA.

The Court, therefore, has precluded small business from receiving attorney fees in board actions.

The Act should be modified to explicitly allow for the award of attorney fees by the boards of contract appeals. The Act was intended to lessen the economic deterrents and disparity between small businesses and their government. It was intended to allow the businesses disadvantaged because of these deterrents and the disparity in resources to vindicate their rights. The boards of contract appeals are a very viable forum for disputes resolution. They have the expertise and the authority to effectivly adjudicate disputes and claims. The economic deterrents posed by a board proceeding, however, are the same as those posed by the court. The disparity of resources available to the small private claimant compared to the Government is as great. NAWGC recommends that Congress truly mitigate the deterrents and disparity faced by small businesses in a dispute with the Government. It can do this by explicitly providing for the award of attorney fees by the boards of contract appeals.

Senator GRASSLEY. Our final panel of witnesses today includes Ms. Ellen Vargyas appearing on behalf of the Alliance for Justice; Mr. Mike McDonald with the Washington Legal Foundation; and Mr. Michael Avakian representing the Center on National Labor Policy.

I'm happy to welcome each of you today, and anxious to hear your perspectives on how equal access is working and what we can do to improve it, and whether or not it ought to be reauthorized.

I think I would like to have you proceed in the same order in which I introduced you.

STATEMENT OF ELLEN J. VARGYAS, ALLIANCE FOR JUSTICE

Ms. VARGYAS. Thank you, Senator.

I am very pleased to have this opportunity to be here today to testify in regard to the Equal Access to Justice Act on behalf of the Alliance for Justice. We strongly support the reauthorization of the act. We support largely S. 919. I think that these hearings have been excellently put together. Nearly every point that we would have made has been raised, so let me just address myself very briefly to a few points.

The point in S. 919 that we're particularly gratified to see is that there has been no effort to distinguish between types of parties on anything other than the basis of their net worth. We know that there have been proposals in the past to differentiate between types of parties and, again, we commend you for not putting that in this proposal, and we hope that it will not come into the proposal.

I would particularly note discussions in the past to completely remove nonprofit associations from eligibility for fees. And I would just say very briefly that we are glad that that proposal has not been made. We believe it would be extremely inappropriate; that they should be evaluated the same as any other party if the Government does not prevail in litigation, and cannot establish that its position is substantially justified, and the association falls within whatever other requirements are imposed. It's very appropriate for them to get fees.

I would like to go to a few points, principally those made by Mr. McGrath in his testimony. He suggested that interim fees should not be allowed. We strongly quarrel with that position. To begin with, there has been very little attention given to this issue. I am aware of one award of interim fees that has been made, so far. It's not an issue which has been much raised. It's not an issue where I think anyone can even suggest that there's been a problem in application in the cases where it is appropriate and certainly the court has to determine that it is appropriate according to standards similar to those in other fee statutes. We believe that it's very important to keep the freedom for courts to award interim fees in appropriate circumstnaces.

I would also like to note the question of constitutional questions, Justice seems to say that fees should not be awarded where they lose a constitutional case. I think that this question actually ties in to the substantially justified question, whether it's the litigation position or the entire policy position of the Government. We strongly take the view that it should be the entire policy position where the Government unnecessarily forces a party into litigation, and then all of a sudden acts very nicely, and immediately offers to settle the case. The fact remains that that party has had to retain a lawyer, has had to go to court and incur expense. That analysis, I think, would extend to the question of constitutional litigation where the Department of Justice might act very nicely in defending that constitutional claim. But if the fact of the matter is that the Government's position, and that position being the defense, is an attempted enforcement of an unconstitutional requirement, then it is again particularly appropriate that the party who has had to bear the burden of going into court to have their constitutional rights vindicated should be compensated.

I would just mention one other issue which has not arisen prior to testimony, but it's the question of social security cases and their coverage under the act. The Department of Justice, and I must say I agree with some of the other witnesses, I would take with somewhat of a grain of salt their protestations of being completely supportive of the act. They have, as probably one would expect them to do, but they have raised every legal claim that they can conscientiously make in defending these cases, and some which are not, I would suggest, too squarely based on the history. In the specific case of social security actions, the history in the act, when it was first enacted in 1980, there was a very specific compromise reached where civil actions would be covered; administrative proceedings would not be covered. The history very clearly reflects that. Regardless of that, in virtually every social security case that I am aware of, the Government is strongly arguing that social security

civil actions, and I'm not talking about the administrative hearings, but civil actions are not covered.

The Government has lost that on nearly every case, although a few, in one case in Iowa, did go the other way. I would suggest that the committee might want to consider, either again through legislative history, although that really did not do the trick the first time around, because the legislative history is quite clear, might want to consider a statutory clarification that civil actions are covered to try and discourage Justice from repeatedly raising and losing this claim, but causing a lot of time and trouble.

That concludes my statement. I would be happy to answer any questions.

Senator GRASSLEY. Thank you. Your statement will be entered into the record in its entirety.

Mr. McDonald.

STATEMENT OF MICHAEL P. McDONALD, STAFF ATTORNEY, WASHINGTON LEGAL FOUNDATION

Mr. McDONALD. Thank you, Mr. Chairman.

On behalf of the Washington Legal Foundation I would like to express our appreciation for the opportunity to appear before this committee this afternoon in order to state our strong support of S. 919, the reauthorization of the Equal Access to Justice Act.

At this point I would ask that my written testimony be entered as part of the record.

Senator GRASSLEY. So ordered.

Mr. McDONALD. Most of the foundation's comments have already been addressed by the other speakers this afternoon. Given this fact as well as the lateness of the hour I will only touch upon three proposed modifications of the act contained in S. 919, that the foundation believes are particularly warranted.

The first proposal has to do with the definition of parties, that is, the deletion of 501(c)(3) organizations, or more accurately, applying the $5 million net worth standard to these groups. The foundation believes that this modification of the act more accurately reflects the Congress intent which was to provide financial assistance to litigators who would otherwise be unable to sue if an award of fees were not made available to them. So we strongly support this proposal. We also agree with many of the other speakers this afternoon concerning the payment of awards under the act. It has been suggested this afternoon that if, as S. 919 would require, individual agencies were forced to pay for the funding of awards out of their own agency budgets, that this would place an unreasonable straitjacket upon them.

However, it is the Washington Legal Foundation's position that payment of awards directly from the agency budget, rather than from the judgment fund, would again be much more in line with the original congressional intent, which was to deter agencies from unreasonable regulation of small businesses.

A third point is S. 919's repeal of the presently existing sunset provision. Mr. Chairman, you noted during the December hearings of this subcommittee that the regulatory noose is around our necks and that it was about time that we took action to breathe a little

easier. We regret to say that despite the fact that we have an administration in office committed to easing the regulatory burden, the problem is not going to be solved overnight. For this reason we welcome the repeal of the sunset provisions, and would like to see a permanent reauthorization of the act, since, as has been suggested by others here today, ways are being constantly found to gut the act's purpose.

Senator GRASSLEY. I don't know what the purpose of the sunset provision was. But I had assumed that it was concern over cost, and I think maybe the history would indicate that it's a fraction of what origionally was envisioned.

Mr. MCDONALD. That is correct, Mr. Chairman. The Administrative Conference of the United States has estimated that the current cost of the act is a mere $700,000, whereas the original projections were considerally larger.

Finally, Mr. Chairman, I would like to stress the continuity of S. 919 with the original Senate version of the Equal Access to Justice Act. We at the foundation believe that the Senate version of the EAJA took the interests of the small businessman, who, as Mr. Nelson said, lives in intimidation of the Government, much more into account than the House version did. And although Senator Baucus has urged us to go forward, the foundation believes that in this instance, going backward to the original Senate version of the act would be in the best interests of small businessmen.

Senator GRASSLEY. Mr. Avakian?

STATEMENT OF MICHAEL E. AVAKIAN, ATTORNEY, CENTER ON NATIONAL LABOR POLICY, INC.

Mr. AVAKIAN. Thank you, Mr. Chairman.

I'm an attorney with the Center on National Labor Policy, and it's an honor for me to appear before your committee today concerning the amendments to the Equal Access to Justice Act. The center is a nonprofit, public interest legal foundation, one of whose major goals is to stem the tide of individual rights and excesses of Government power.

Most of our litigation has been devoted to representing employees whose rights have been abused under our national labor laws. Since the act has been in effect for approximately 2½ years now, it's only been within the past 6 months that numerous cases have been reported, and have been coming down from several courts and the agencies. Of course, none of the agencies except in one instance has awarded fees against itself.

Just a little background on my experience under EAJA. I have represented clients in four separate cases, which I have outlined in my prepared statement.

I would like to address the rest of my comments to two substative points which I make in the statement. Concerning the substantial justification standard, we've heard this afternoon there have definitely been problems with the courts. They have gone all over the park in terms of trying to come up with some sort of standard to use. I know the legislative history uses reasonableness in the law, and in fact, that's basically what is dealt with.

A couple of more recent cases have looked to what the Senate had done earlier, I believe, in 1979 in rejecting a standard of reasonable justification, and have said, well, since reasonable justification was not entered, then the standard is going to be slightly one above reasonableness. However, my experience has demonstrated that the courts, at least, have gone and looked at the agencies' record in the case and have bent over backward to find reasonableness. And consequently, fees under the act have not been awarded.

The injustice of using the litigation posture concerning substantial justification is evident on its face, especially in numerous situations where either a consent judgment or a settlement has occurred in the case: A particular fact situation evidenced in the legislative history earlier on.

However, in that particular case, there, where a settlement does occur, or where it takes a lawsuit to force an agency to come to terms and to settle a case, there is no litigation posture to look at. There might be a complaint in Federal court, but the case is not even heard by a judge, the judge has not even viewed the Government's arguments or even the plaintiff's arguments in those particular cases. In fact in one particular case that I'm aware of, the Government argued that the mooting of a case by providing voluntary relief by the Government deprived the Federal court of article III jurisdiction, for there was no longer a case or controversy. Therefore, the Federal court cannot even issue a fee award. I think that was somewhat egregious, but the argument has been made by the Department of Justice.

I have proposed a couple of legislative changes, and some language in my statement. However, I think what needs to be done in terms of patching up the substantial justification concept is to leave the burden where it was supposed to be in the first place, which was on the Government.

Procedurally, when a party prevails on the merits of a case, he files his application for costs and fees, and alleges that the position of the Government was not substantially justified. Our experience has demonstrated that the Government procedurally replies by pointing only to the record and to the briefs which it provided in the case. This amounts to its complete defense for the purposes of EAJA. Consequently, the burden unfortunately shifts to the prevailing party to prove that the Government actually did lack justification. Since the burden of proof has in practice been transferred to the prevailing party contrary to congressional intent, and that's the practicality of the situation, it appears that the only way of putting it back would be to specifically mandate that the burden of proof be kept on the party who, "has readier access to knowledge of the facts in question."

I would point out that that prior quote from the earlier legislative history would appear to indicate that what Congress was also interested in was finding out what nonrecord facts existed in the case, and the need for the Government to highlight those nonrecord facts, as obviously the case and the record would speak for itself both to the judge and to the parties. Since a formal record in a particular proceeding provides no means of scrutinizing unreasonable prelitigation conduct, a point made by other people testifying this afternoon, most cases don't even reach that point. Congress

earlier references, then, to facts in question would seem to imply a search for something not already known.

We submit that the act be amended so that the agencies involved must proffer proof that at the very least it, one, followed precisely its own rules and regulations, and, two, that its internal decision to adopt a particular position adverse to a small business or citizen, was eminent. This would be accomplished by a verified statement or affidavit, and, of course, if the Government chose to present this information, there would arise a need for verification through limited discovery.

As onerous as that may sound to the Government, it could prevent this limited discovery by not opposing an award of fees in the first instance. To play the scenario out, what would be discoverable then was the Government's administrative position, or decision document in recommending litigation.

This information could resolve, I submit, most of the questions concerning the substantial justification test. Although a proposal such as this is certain to be opposed by Government agencies, information of this sort would provide the Congress, and of course the reviewing court a true means in which to evaluate agency action, and insure to the country's citizens and businesses that the agency went into litigation only after it followed its enabling statute, its own rules and regulations and its own published positions.

In a short conclusion, I would say that the EAJA embodies a particularly noble purpose, that is, to insure the public policy of the country is created after all positions on an issue have been fully aired, rather than based on an imbalance of economic and legal resources. The act, however, in my experience, has developed several technical impediments to achieving that goal, and actually being involved in litigation on EAJA fees in four cases, suggests that reforms of the sort that I have suggested and that others this afternoon have suggested, would bring the objectives that EAJA seeks much closer.

Thank you.

Senator GRASSLEY. Thank you. Your statement also will be made a part of the record.

Once again, even though I have specific questions for some of you, if any of you wish to respond, I would encourage you to do so.

Mr. McDonald, as you are aware, S. 919 repeals the attorney fee provisions in TEFRA. Would you advocate covering tax litigation under Equal Access, or retaining the current language in TEFRA?

Mr. MCDONALD. It is the position of the foundation that the S. 919 is correct in repealing the TEFRA provisions, and that the Tax Court should come under the Equal Access to Justice Act.

We feel that the burden of proof that TEFRA puts on the taxpayer is simply not what Congress had in mind when it enacted the EAJA, and that there is no good reason for giving the IRS such an overwhelming advantage when it comes to the awarding of attorneys fees.

So we stand foursquare behind S. 919 on this point.

Senator GRASSLEY. Also, Mr. McDonald, would you give us your opinion on the proposal to require agencies to pay an award within 60 days after it has been granted, or interest would then start accumulating?

Mr. MCDONALD. Mr. Chairman, I can only echo the remarks of Senator DeConcini on this proposal. The Washington Legal Foundation believes that it would be a wonderful idea, to have the Federal Government pay its bills on time, and, again, the foundation would support such an amendment to S. 919 to provide for that.

Senator GRASSLEY. Mr. Avakian, could you give us an example of where discovery procedures would have resulted in an award, and without these procedures an award was not granted?

Mr. AVAKIAN. I can give you an example which is very close, Mr. Chairman, and one arising out of your home State of Iowa: A recent decision by the National Labor Relations Board which I have here and would be willing to share. I mention it in my prepared statement.

The case involves, basically, a decision on whether or not a particular person or company was an alter ego. It was the *Iowa Parcel Service* case, and that particular question had already been resolved by the Interstate Commerce Commission and by an Iowa State Development Board.

However, the National Labor Relations Board decided it wasn't going to follow those particular line of cases. The facts of the case demonstrated by the administrative law judge on review of the EAJA application states that the National Labor Relations Board did not even present a prima facie case in that situation, did not investigate the charged party, Iowa Parcel Service, for the violations that were going to be alleged, which means before they even filed their complaint, they didn't even ask Iowa Parcel what had happened to them, and give the party the benefit of their statement on the case.

The administrative law judge also indicated that this failure to investigate, that the Government is supposed to make an investigation, is part of the general counsel's statutory responsibilities. However, in addition, he failed to follow the rules and regulations of the National Labor Relations Board which are in the Code of Federal Regulations, and he also failed to follow the procedures in his own case handling manual.

However, all these failures to follow these dedicated procedures still led the administrative law judge to find the position of the NLRB—even though it didn't make a prima facie case—substantially justified, because you had some facts, basically some credibility facts which the ALJ was giving him the benefit of the doubt. That decision was approved by the full Board about a month ago.

Senator GRASSLEY. Thank you, Mr. Avakian.

Ms. Vargyas, in connection with social security cases, I understand that when a case is remanded it is unclear whether the fees can be awarded. Does the Alliance for Justice have a position on this?

Ms. VARGYAS. Yes, Senator, we do. It's a very serious technical problem. It goes to some of the finality questions which were discussed earlier. The particular problem is that, in social security context, most cases in district court, most favorable decisions are remands. They're sent back down to the Secretary for a final decision. The problem that results is that under the compromise which I discussed earlier, social security administrative proceedings are

probably not, although it's not absolutely clear, are probably not covered under section 504.

We therefore have a very confusing situation, if you have a court remand, which was a favorable order, but you don't have your final order until you're sent back down to finish your administrative proceedings. Now, in the cases which I've seen, which have gone this procedural route, the Secretary is sort of arguing both sides against the middle. On the one hand they're arguing you haven't prevailed in district court because it's not a final prevailing order, if the claimant hasn't gotten benefits yet. On the other hand, they're arguing that when you go back down in the administrative proceedings, which, according to them you need to do, in order to get a favorable decision, then you're not covered under the act anymore because it's not a 554 adversary proceeding.

We would urge clarification in the statute that once there is a Federal district remand order in a social security case, that for the purposes of the act, that the rest of the proceedings which occur are covered, and I guess it would be through section 24.12, since the court does, in most cases, technically retain jurisdiction until there's a final decision. It's one of those situations which is very confusing. The act doesn't address it, and it would be our position that the act should address it to expedite litigation.

Senator GRASSLEY. Thank you very much.

I want to thank the panel for your testimony.

[The statements and submitted material follow:]

Prepared Statement of Ellen J. Vargyas

Mr. Chairman and Members of the Subcommittee:

My name is Ellen J. Vargyas. I am pleased to be here today to testify on behalf of the Alliance for Justice in support of the reauthorization of the Equal Access to Justice Act. The Alliance for Justice is a national association of public interest organizations whose purpose is to secure access to the courts and agencies on behalf of historically unrepresented interests and groups.

I have followed carefully the implementation of the EAJA, discussed pending cases with literally dozens of attorneys and authored several articles on the subject.

The EAJA stands as an example of legislation which is effectively and economically achieving its purpose -- no less than increasing the accountability of the federal government to persons and organizations of modest means. It accomplishes this goal by the relatively simple technique of shifting the costs of litigation to the federal government in cases where the government does not prevail and cannot establish that its position was substantially justified. Because it is designed to remove the significant economic barriers which stand in the way of most people's ability to pursue their legal rights, the Act makes it possible for small businesses, individuals of limited means and public interest organizations to protect their rights and interests in the courts and agencies. To qualify, individuals must have a net worth under $1,000,000 and businesses or organizations a net worth under $5,000,000. Agricultural cooperatives and non-profit organizations are exempt from the net worth requirements.

The early experience with the EAJA -- and it has now been in effect for over one and a half years -- demonstrates that it is working well. Courts are carefully and conservatively interpreting the EAJA's requirements but are most definitely awarding fees in a wide range of cases where the government has taken an unjustifiable position. The result has been both to encourage responsible litigation against the government by

private parties as well as to take the first steps to discourage the government from abusing its enormous power in the legal arena.

Also important, the EAJA is accomplishing its purpose at a modest cost. Overall, courts have been parsimonious in evaluating fees and hours claimed. Combined with the careful analysis of claims on substantive grounds, the result has been far fewer awards at far smaller amounts than originally projected. Available data strongly suggests that the cost of the Act will only be a tiny fraction of the Congressional Budget Office's figure of somewhat over $300 million over the EAJA's initial three year life span.

In our view, the EAJA should be permanently extended, and is in need of only minor adjustment. Based on this view, we are gratified to see that the reauthorization bill which has been introduced, S. 919, would remove the sunset provision but otherwise leave the EAJA essentially intact. We are particularly pleased to see that, except with one matter which I will address shortly, S. 919 makes no effort to differentiate between types of litigants against the federal government other than on the basis of their net worth. One of the major strengths of the EAJA is that it is truly concerned with extending <u>equal</u> access to justice -- for all kinds of litigants with all kinds of claims. In our view, it would defeat the purpose of the Act as well as undermine the broad base of support which it now enjoys to carve up classes of litigants and determine that some are somehow more deserving than others.

Our concern in this regard with S. 919 is that it would subject non-profit organizations to the $5,000,000 net worth requirement while continuing to exempt agricultural cooperatives. Both of these classes of entities were exempted from the net worth requirement under current law because of the view that the financial requirement made little sense regarding either. We continue to support that reasoning and urge the Subcommittee to continue to exempt non-profits along with the agricultural cooperatives. If however, the committee chooses to subject non-profits to the net worth requirement, we believe

that it would be exceedingly inappropriate to set one narrow class of litigants -- agricultural cooperatives -- apart from all others and allow them to reap the EAJA's benefits regardless of their size and the extent of their resources.

We are also extremely concerned about proposals which have been made in the past and may presently be made before this Subcommittee to completely bar non-profit associations from receiving benefits under the EAJA -- even where they have prevailed in litigation against the federal government and the government cannot establish that its position was substantially justified. At the outset it should be noted that there have been very few awards made to non-profits under the EAJA. There is not even a suggestion which can be made of any abuse or improper use of resources in this regard.

The more important issue, however, is that to bar non-profits from eligibility for fees would defeat the basic purposes of the Act. One of the two major purposes of the EAJA is to give litigants of limited resources the means to oppose unjustifiable government actions which adversely affect their interests. Since all litigants must satisfy the constitutional and prudential rules of standing, there can be no argument that somehow non-profits are not as intimately involved in litigation they may bring as are other parties. In addition, when non-profits are forced to spend their limited resources in fighting unjustifiable action by the government, it is just as appropriate to reimburse them as private parties.

The second major purpose of the EAJA is to discourage the government from abusing its enormous power. It would be wrong indeed, to give the government the message that it must clean up its act in its legal dealings with one class of citizens but that it may do anything it chooses when its adversary is a non-profit organization.

The one positive amendment which we urge the Subcommittee to make is to clarify the meaning of the "substantially justified" standard. In interpreting the test, courts have split on whether it refers to the government's litigation position

alone, or to the underlying policy position advanced by the government as well. In our view, if the EAJA is to have any meaning, the court must evaluate the government's underlying policy position as well as its litigation position in reaching its decision of whether the government's position is "substantially justified."

The alternative view, which has been urged by the government, is that regardless of how unreasonably or arbitrarily it may have acted in forcing someone into litigation, if the government then acts with restraint and in careful observance of all court rules and applicable precedents, fees should not be allowed. We believe that this interpretation undermines the basic purpose of the EAJA, which is precisely to deter the government from taking such arbitrary and unreasonable action. It should not matter if the government acted in the context of litigation or the pre-litigation development of the case.

In fact, to resolve this problem, the Subcommittee should clarify either through an amendment or very clear legislative history that the substantially justified standard refers to the totality of the government's action in connection with the case. A recent opinion by the Third Circuit, Natural Resources Defense Council v. EPA, No. 81-2068 (slip opinion at 13; 3d. Cir. decided March 23, 1983), contains an excellent analysis of the legislative history on this issue. It concludes that the underlying conduct of the agency, not merely its trial conduct, must be considered.

This completes my prepared statement. I would be happy to respond to any questions you may have.

Prepared Statement of Michael P. McDonald

Mr. Chairman and members of this subcommittee, I am Michael P. McDonald, staff attorney with the Washington Legal Foundation. On behalf of the Foundation I wish to thank you for this opportunity to present our views on S.919, the reauthorization of the Equal Access to Justice Act.

The Washington Legal Foundation (WLF or Foundation) is a non-profit, public interest law firm which engages in litigation and the administrative process in matters affecting the broad public interest including government regulation, constitutional rights, and crime victims rights.

The Washington Legal Foundation presently has more than 85,000 members and contributors nationwide many of whom are small businessmen. My comments today reflect the concerns of our members and the public as a whole. I wish to make it clear that the Foundation is not lobbying for or against the passage of this legislation, but merely offering our views on its public interest aspects based upon our administrative law experience in aiding small businessmen.

I would like to express at the outset WLF's support for the purpose of the Equal Access to Justice Act. Because the Act encourages citizen access to courts and administrative proceedings with respect to the government through the device of fee shifting, it is a much-needed instrument for making the government more accountable in the exercise of its enforcement powers and more responsive to its citizens' needs. Thus the reauthorization of this legislation by the Congress will help insure that government agencies are not engaging in excessive, unreasonable regulation of small businesses.

The present reauthorization bill S. 919 contains a number of modifications of the present Act, most of which are minor. Three proposed changes, however, are important and merit comment. They are: (1) the deletion of large and wealthy 501(c)(3) non-

profit organizations as parties eligible to receive awards under the Act; (2) the proposed change in agency funding of fees and other expenses awarded under the Act; (3) the proposed elimination of the Act's sunset provision. It is important at this point to stress the continuity of each of these proposed changes with the original Senate versions of the EAJA. Each is a direct outgrowth or, more properly, a return to earlier Senate consensus positions on how the Act could be made to function most effectively.

501(c)(3) Organizations

The proposal to eliminate the special exemption for 501(c)(3) organizations as a separate and distinct party and to place them under the same eligibility criteria as other small businesses and entities to receive funds under the Act has engendered a good amount of controversy. In large part this is due to the misperception that this proposal is aimed at stiffling the legal actions of adversary political advocacy groups. In fact, however, this change is being proposed in order to better carry out the central purpose of the Act, namely, to benefit only those parties for whom financial considerations may be a significant deterent to pursuing litigation against the federal government. There is no justifiable reason for denying awards to entities with more than $5 million in net worth and more than 500 employees as the Act presently does and at the same time carving out a blanket exception for all 501(cf(3) organizations regardless of their size or net worth. Holding 501(c)(3) organizations to the same size and net worth limitations as other businesses would actually allow those 501(c)(3) organizations that are able to meet these requirements to win attorneys' fees and expenses against the government while it would, at the same time, make the Act more rational. This proposal is therefore clearly in the public interest and the Washington Legal Foundation supports its enactment.

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Payment of Awards

A technical but nonetheless important change contained in the reauthorization of the EAJA concerns where the money for the payment of awards to parties is to come from.

Presently, the Act states:

> Fees and other expenses awarded . . . may be paid by any agency over which the party prevails from any funds made available to the agency, by appropriation or otherwise, for such purpose.
>
> 28 U.S.C. §2412(d)(4)(A)

In addition, Section 207 of the Act of the Act now provides that "[t]he payment of judgments, fees and other expenses in the same manner as the payment of final judgments as provided in this Act is effective only to the extent and in such amounts as are provided for in advance in appropriations Acts."

The precatory language of the present Act together with the requirement that specific appropriations be made for payment of the awards under the Act was not contained in earlier Senate versions of the legislation. These earlier versions, and the present amendments provide for mandatory payment exclusively by the concerned individual agencies.

The proposed changes comport with one of the central objectives of the Act: to encourage caution on the part of agency litigators who otherwise would have a free hand to harrass small businessmen through overregulation. The changes eliminate any uncertainty over whether individual agencies have to pay a prevailing party. It will force agencies to exercise caution and set enforcement priorities and is thus clearly in the public interest.

Repeal of Sunset Provision

The Equal Access to Justice Act took effect for a three-year test period starting October 1, 1981. Provisions in §§ 203-204 of the Act repeal its provisions effective October 1, 1984. One

of the proposed changes in S. 919 would repeal these sunset provisions thereby allowed the reauthorized Act to continue in perpetuum or until Congress should decide at some distant time that it has outlived its usefulness.

The EAJA embodies two important concepts. The first is that government agencies should be held accountable for the attorneys fees of small businesses that were the direct result of the unjustifiable conduct on the part of the agency in question. The second aim of the framers of the Act was to encourage small businesses and private individuals who were being injured through arbitrary governmental action and regulation to pursue litigation against the government.

The Act was badly needed. We have now experienced its operation and hearings held last December before this Subcommittee indicated that the act is being implemented as intended and is achieving the desired results. Despite the fact that we now have an Administration dedicated in word and deed to ending overregulation by federal agencies the problems appear to be inherent in the system. Because of the demonstrated effectiveness of the Act, the Washington Legal Foundation strongly believes that is should become permanent. We therefore support the deletion of the sunset provision.

In conclusion the Washington Legal Foundation urges the Senate to adopt S.919 as presently drafted. We stand ready to assist the members of the Subcommitte and its staff in any way possible. Thank you for the opportunity to appear before you today.

Prepared Statement of Michael E. Avakian

SUMMARY OF THE TESTIMONY OF THE CENTER ON NATIONAL LABOR POLICY

The Center on National Labor Policy proposes and urges Congress adopt the following revisions to the Equal Access to Justice Act:

A) Amend Section 2412(d)(1)(A) of the Act to require that the position the government must prove was substantially justified is the underlying circumstances that led either the prosecution or defense to the lawsuit. It is submitted that this obligation be proven through a verified statement by the governmental entity involved that it (1) followed its own Rules and Regulations and (2) that its decision to adopt a particular position adverse to a fees applicant was eminent;

B) Amend Section 2412(d)(1) by adding a new provision that will provide for de novo review by a Court of Appeals of a prior district court fee determination when the facts are undisputed;

C) Amend Section 2412(d)(1)(A) of the Act to provide for recovery of fees for work done in administrative proceedings in addition to those fees recoverable for time spent in subsequent civil litigation.

SUGGESTED AMENDATORY LANGUAGE

28 U.S.C. §2412(d)(1)(A):

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort) including agency proceedings brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the underlying position of the United States was susbtantially justified or that

special circumstances make an award unjust, but only after having received verifiable proof of agency compliance with published rules and procedures.

28 U.S.C. §2412(d)(1)(D)

A party dissatisfied with a fee determination made under Section (d)(1)(A) may file a notice of appeal with the United States Court of Appeals pursuant to Title 28, §1291. In such cases, the Court of Appeals shall review the lower court's fee determination de novo.

5 U.S.C. §504(a)(1)

An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the underlying position of the agency as a party to the proceeding was substantially justified or that special circumstances make an award unjust, but only after having received verifiable proof of agency compliance with published rules and procedures.

Note: Underlined language is new

* * *

Mr. Chairman and Members of the Subcommittee:

My name is Michael Avakian and I am an attorney with the Center on National Labor Policy. It is an honor for me to appear before you today, at your request, to discuss proposed amendments to the Equal Access to Justice Act ("EAJA"). The Center is a public interest, non-profit legal foundation whose major goal is to protect individual rights from excesses of union and governmental power. Most of the Center's litigation activity is devoted to representing employees whose rights under our National Labor Laws have been violated.

SUMMARY OF THE CENTER ON NATIONAL LABOR POLICY'S GENERAL POSITION ON AMENDING THE EQUAL ACCESS TO JUSTICE ACT

The Center on National Labor Policy believes that the Equal Access to Justice Act needs to be amended to meet the needs for which it was enacted 2 1/2 years ago.

Only within the past six months has the Act been generating any significant amounts of reported litigation. However, as in any new statute, there is much judicial jockeying and interpretation taking place in the district courts, but not many awards. Not one agency has made an award against itself to date.

There are many reasons for the failure of the EAJA to result in the award of attorneys' fees. In the forefront are technical barriers imposed, unintentionally we believe, by the Act itself. These problems we would like to point out and suggest some changes.

INTRODUCTION

The premise upon which the Equal Access to Justice Act was enacted was to encourage small businesses and individuals with limited financial resources to contest unreasonable governmental practices which result in litigation. Congress realized that all too often small entities were giving in to unreasonable governmental tactics and abuses only because they lacked funds to hire legal counsel to protect their rights in court or before administrative agencies. To remedy this unfairness, Congress provided for economically "small" litigants to recover their legal fees from the government if they prevailed against it and if the government's action was determined to be unreasonable or without foundation.

Since EAJA's effective date in October 1981, I have represented clients on four different occasions against three different federal agencies in which an application for attorney's fees was filed pursuant to the Act. Those cases are Tyler Business Services, Inc. v. NLRB, 695 F.2d 73 (4th Cir. 1983); Spencer, et. al. v. NLRB, 548 F.Supp. 256 (D.D.C. 1982), appeal docketed, No. 82-1851 (D.C. Cir. July 26, 1982); Donovan v. Ramsey, No. 82-1549-14 (D.S.C. Sept. 15, 1982); and Williams

v. FEC, No. 80-1336 (D.D.C. Sept. 14, 1983). This personal experience has revealed several ambiguities and gaps within the legislation which may be preventing the Act's purpose from being realized. I support the revisions that the subcommittee has proposed in S. 919, but additional and more substantive amendments must be made.

A. The Substantial Justification Standard

Section 2412(d)(1)(A) of the Act commands a court to award attorneys' fees and expenses to a prevailing party in any civil action unless it "finds that the position of the United States was substantially justified or special circumstances make an award unjust." The House Judiciary Committee report accompanying the Act stated that the government can demonstrate "substantial justification" and thus avoid an award of fees against it if it can prove that its case had a reasonable basis both in law and fact. H.R.REP. No. 96-1418, at 11, [1980] U.S. CODE CONG. & AD. NEWS at 4990. However, the term "substantially justified" survived an amendment to make it "reasonably justified," a standard which the Committee on the Judiciary recognized as being lower. S.Rep. No. 96-253, 96th Cong. 1st Sess. 8 (1979). Also Wolverton v. Schweiker, 533 F.Supp. 420 (D. Idaho 1982).

From the outset, there arose a technical dispute in the courts as to whether the position requiring this substantial justification refers to the "litigation posture" of the United States or the "underlying circumstances" that generated the civil action. Predictably, the government has consistently urged that it is the "litigation posture" which must be substantially justified. This suggested interpretative mode restricts the court or agency from looking back at unreasonable prelitigation events which may have forced a party to initiate or defend legal action to protect itself. Such a restrictive construction results in the government's escaping liability for

fees in too many cases in which Congress clearly intended an award to be made. Litigants generally do not find unreasonable the demeanor of government attorneys which the "litigation posture" analysis presents for scrutiny.

The "litigation posture" interpretation of substantial justification has been the minority view. Courts that have addressed the issue are split at least 3-1 in favor of the analysis that the duty of the federal court is to examine the "underlying action" giving rise to litigation in order to determine whether the government's position in court was substantially justified. One of the earliest decisions which embraced this view, the Photo Data case from the District Court of the District of Columbia, Photo Data, Inc. v. Schweiker, 533 F.Supp. 348 (D.D.C. 1982), reasoned that focusing on the narrow litigation posture as the only position that need be justified by the government would contravene the remedial purpose of the Act.

For example, in many instances where an applicant has filed for an EAJA award, there will not even exist a "litigation posture" for the Court to examine to determine substantial justification. As posited earlier, many of the reported cases disclose situations where the government has acted in an irresponsible and reckless manner towards an individual or small business, thereby causing the private party to initiate legal action to redress the wrong. Then, just before or shortly after the complaint has been filed, the government moves to moot the case by correcting its earlier misconduct. Yet, the plaintiff has already incurred legal fees by hiring counsel to represent himself and the federal judge has never even been confronted with briefs or appearances of counsel. This situation was recognized by Congress in the legislative history, H.R.Rep. No. 96-1418 at 12, but the "substantial justification" analysis has constrained the award of fees in these situations.

The government, even in this example, advocates that the Court look only to its "litigation posture" in deciding whether fees should be assessed against it. Since there is little, if any, litigation posture to be examined where a consent judgment or mootness occurs, the government does in fact argue that the fees expended by the plaintiff in preparing for the lawsuit on these facts are unrecoverable since a "case" or controversy for purposes of U. S. Constitution Article III jurisdiction of the federal courts no longer exists. The courts have split on this interpretation. Compare Spencer, et. al. v. NLRB, 548 F.Supp. 256 (D.D.C. 1982) with Costantino v. United States, 536 F.Supp. 60 (E.D. Pa. 1982).

The Center urges that the Act be clarified by specifically adopting the majority "underlying circumstances" interpretation of substantial justification. This will preclude anomalous results which I have just described from happening. Additionally, the government can be expected to act more carefully in developing or preparing an action against a party by knowing in advance that if that party is forced to hire counsel to expose unwarranted governmental activity towards him at any stage of an administrative or judicial proceeding, it will be responsible for litigation fees resulting therefrom. This is the Act's argued purpose.

1. The Government's Proof of Substantial Justification

In its defense of a case or agency action where the government has lost, the "prevailing party" files its application for costs and fees and alleges that the position of the government was not substantially justified. 28 U.S.C. §2412(d)(1)(B). The government procedurally replies to the application by pointing to its briefs and the record it established in the case. This amounts to its complete defense for purposes of EAJA. Consequently, the burden of proof unfortunately shifts to the prevailing party to prove the

government's lack of justification. This result runs contrary to the legislative history which demonstrates that the burden of proof was intended to rest solely with the government. It is easier for the government "which has control of the evidence, to prove the reasonableness of its action than it is for a private party to marshall the facts to prove that the Government was unreasonable." H.Rep. No. 96-1418, 96th Cong., 2d Sess. 10-11. This reality of litigation certainly does not comport with the requirement that the government make a "strong showing to demonstrate that its action was reasonable" as emphasized in the legislative history. H.R.Rep. No. 1418 at 18.

Since the burden of proof has in practice been transferred to the prevailing party contrary to Congressional intent, it appears that the only way of putting it back on track would be to specifically mandate that "the burden of proof [be kept] on the party who has readier access to and knowledge of the facts in question." H.Rep. No. 96-1418, 96th Cong., 2d Sess. 10. This legislative language would appear to indicate that non-record facts need highlighting by the government, as the record in the case speaks for itself to both parties and the reviewing court or agency. Since the formal record provides no means of scrutinizing unreasonable pre-litigation conduct in most cases, the Congress' earlier references to "facts in question" would seem to imply a search for something not already known.

2. Satisfaction Of The Government's Burden

It is submitted that the agency must proffer proof that at the very least it (1) followed precisely its own Rules and Regulations and (2) that's its internal decision to adopt a particular position adverse to a small business or citizen was eminent.

This would be accomplished by a verified statement or affidavit. Of course, if the government chose to present this

information, there would arise a need for verification through limited discovery. As onerous as that may sound to the government, it could prevent this limited discovery by not opposing an award of fees. To play the scenario out, what would be discoverable then, is the government's administrative position or decision document recommending litigation. This information could resolve most of the questions concerning the substantial justification test.

Although this proposal is certain to be opposed by government agencies, information of this sort would provide the Congress and the reviewing court a true method in which to evaluate agency action and ensure to the country's citizens and businesses that the agency went into litigation only after it followed its enabling statute, its own Rules and Regulations and published positions.

An agency like the National Labor Relations Board would oppose a statutory directive of this nature on the grounds that its unfair labor practice proceedings require the resolution of credibility issues proper only for an impartial trier of fact. Yet, the Board's own compliance manual would indicate otherwise. "On the basis of its investigation, the Regional Office is expected to resolve factual conflicts ... Where a witness has been contradicted on a relevant fact since he last gave testimony, he should be reinterviewed. And, to the extent further reinterviews of witnesses will help to resolve the issues, they should be undertaken. Finally, in situations where factual issues are close, it may be appropriate to have a reinterview conducted by a second Board agent (typically, an attorney assigned to the case) ... In the infrequent case in which (1) applying all relevant principles, the Region is unable to resolve credibility, and (2) the resolution of the conflict means the difference between dismissal and issuance of complaint, a complaint should be issued. (emphasis in original). This is not to be construed, however, as permitting

the avoidance of the making of difficult decisions." NLRB Case Handling Manual, §10060 (1975) (emphasis added).

Accordingly, few cases involving credibility questions ought to reach an administrative law hearing when the NLRB has followed its procedure. However, it has been suggested that the Board will argue the "mere existence of credibility issues establishe[s] its burden of proving substantial justification." See also A. Peterson, The NLRB and Equal Access to Justice: A Promise Unfulfilled?, CCH Labor Law J. (May 1983).

The best example of the need for proof of agency compliance with its enabling legislation and rules of procedure is evidenced in the recent NLRB decision in Iowa Parcel Service, Inc., 266, N.L.R.B. No. 79 (March 7, 1983). In that case, the ALJ found that the General Counsel did not present a prima facie case and did not investigate the charge with the charged party prior to filing his complaint. However, Section 3(d) of the National Labor Relations Act, 29 U.S.C. §153(d), suggests that the General Counsel has a mandatory duty to investigate charges and, therefore, his failure to do so not only ran contrary to the Act but also specifically runs contrary to the Board's Rules and Regulations (§101.4) and the General Counsel's Case Handling Manual (§10056.4 and 10056.5). Yet, the ALJ in the case held "[w]hile this failure to pursue all reasonable avenues of investigation prior to litigation is regrettable ... and certainly not to be condoned, I must conclude that the evidence which the General Counsel had in its possession justified its issuance of the complaint ...." As to that evidence in his possession, the ALJ found that the General Counsel's theory of the case even ran contrary to public decisions of the Interstate Commerce Commission concerning Iowa Parcel Service and the Iowa Transportation Regulation Board and further countervailing facts would have been presented if the General Counsel had attempted to interview or obtain affidavits from Iowa Parcel. The Company had offered to cooperate in the

Board investigation, but the Board chose not to accept.

The Board, for its part, affirmed the Administrative Law Judge's denial of attorneys' fees under the Act.

Congress and the public should insist and be satisfied that the Board in fact does its job by proving its compliance with its publicized procedures. When the agency does so, more cases of unreasonable government action will be eliminated.

3. The Question Of Limited Discovery On The Issue Of Substantial Justification

EAJA was enacted with a concern that the government was taking advantage of its litigation resources and the economic imbalance existing between it and individuals and small business. Congress hoped that EAJA would provide a barometer to test the extent of unreasonable government action.

Since the NLRB has communicated to this Subcommittee in December 1982 its dismay with the some 60 odd cases presented to it over the course of the first year, further examples of that agency's practices should be illuminated.

The Board prides itself on the number of cases it settles each year. In 1982, the NLRB General Counsel boasted that the level reached 99%. It has been suggested that a much reduced settlement figure would have been obtained if there were to be discovery along the lines permitted in federal court under Rule 26 of the Federal Rules of Civil Procedure.

The typical Board ALJ proceeding runs approximately $5000 in legal costs. For the respondent to a Board unfair labor practice charge, back pay or compensation frequently runs much less, consequently, settlement is engaged to reduce costs. Of course, in a settlement, no public record exists for the agency or a court to review.

The Board, for policy reasons, has chosen to prohibit any discovery of either s[illegible]s' case in an unfair labor practice proceeding. Rules and Regulations of the National Labor

Relations Board, §102.118. It has also chosen to prohibit any discovery in EAJA litigation. Lion Uniform, Janesville Apparel Division, No. 10-CA-12948 (Nov. 15, 1982)(ALJ granted discovery, Board reversed).

Consequently, both sides never know what evidence exists in a case until it goes to hearing. If discovery were permitted, even if it were of affidavits given by witnesses (now forbidden by §10058.2 of the Case Handling Manual), each side could evaluate the evidence and enter into settlements with the benefit that settlement otherwise protects their interests, not just their pocketbooks. On the other hand, if the General Counsel's evidence reflects a lack of evidence, the private party could continue to object to the agency action with the reasonable assumption that the Government could be pressing an unreasonable case where fees would be awarded under EAJA.

Of course, the NLRB could keep its procedural rules intact, prohibit pre-trial discovery, and set itself up for numerous applications for fees under EAJA as is currently the case. The Center submits that the governmental agency bears the burden to conform its procedural rules and practices to conform to the EAJA and not vice versa.

The Center recommends this Committee make applicable to the Equal Access to Justice Act the discovery rules contained within the Federal Rules of Civil Procedure. This will allow an EAJA fee applicant in a situation where a case never reached trial to probe the government's reasons not to defend or prosecute.

This will provide the reviewing court with a more accurate explanation of the government's underlying actions rather than allowing the government, in a situation where it clearly acted wrongfully, to simply state that its position was substantially justified.

B. The Standard Of Review

Another problem which has arose has pitted the Justice Department against other agencies. The question centers on the standard of appellate review of agency action for enforcement of agency orders.

Section 504(c)(2) creates an abuse of discretion standard for appellate court review of agency fee awards. No standard of review is provided in the statute for appellate review of a district court fee determination.

The Fifth Circuit has chosen the "abuse of discretion" standard. See Knights of the KKK v. East Baton Rouge Parish School Board, 679 F.2d 64, 68-69 (5th Cir. 1982). However, the case was decided on remand from the Supreme Court, without benefit of a record in the case and consequently, the validity of the decision on this point is in dispute.

The NLRB in a case now pending before the U. S. Court of Appeals for the District of Columbia Circuit, Spencer, et. al. v. NLRB, No. 82-1851, argued on March 22, 1983, that the court should review an award and failure to award fees under the "abuse of discretion" standard. Spencer is a situation where the NLRB provided complete relief to the plaintiffs only after suit was filed in district court. Thus, the federal question in the case was mooted. The district court found the NLRB's position to be substantially justified while simultaneously refusing not to decide the underlying controversy.

The Justice Department has taken a contrary view of appellate review. In the Ninth Circuit case of Hoang Ha, et. al. v. Schweiker, No. 82-4477 (Reply Brief of March 11, 1983), Justice argued that "the appropriate standard of appellate review must be determined in each case by reference to the nature of the issues that were resolved by the district court and that were dispositive of the question of substantial justification." Reply Brief at 3.

Justice argues that de novo review is appropriate.

"[W]here, as here, the district court's determination of substantial justification involves the evaluation of an agency's legal arguments in the context of undisputed facts, the district court's judgment should be freely reviewable by an appellate court." Reply Brief at 4. Consequently, deference to a trial court's evaluation of a case is unnecessary.

In fairness, the government or a private party should not be able to pick and choose its arguments in the unfortunate void created by the original enactment of EAJA. In fact, the inability of the government to formalize a single position on the statute's review procedure in this regard presents a situation where a private litigant should receive an EAJA award as a matter of course, since the private party is presented or not presented with litigating a question of law depending on what government agency is at hand.

The Center proposes that the Justice Department's position favoring de novo review of a district court fee determination is appropriate where facts are not in dispute. Where underlying facts and other credibility issues are resolved by the trial court, then an "abuse of discretion" standard of review would be appropriate on a case by case basis.

C. Recovery of Attorneys' Fees In Judicial Proceedings For Time Spent Before An Agency

Section 2412(d)(1)(A) of EAJA provides for an award of attorneys' fees "in any civil action ... brought by or against the United States...." Cases in which the Center has applied for an EAJA award seeking fees for litigation time spent before an agency, the agency has argued that Section (d)(1)(A) only provides for costs and attorneys' fees for time spent before the Court. It has argued that any costs and fees incurred in litigating the agency proceedings could be recovered only by filing an application with the agency. This argument is frivolous at best, since a party would not be able to seek fees

from the agency since it did not become a "prevailing party" until suit was ultimately brought in federal court.

It is submitted that the term "civil action" referred to in subsection (d)(1)(A), for which fees are recoverable, should necessarily encompass fees for review of agency adversary adjudications as mandated by the judicial review subparagraph, (d)(3), of the same section. However, because the Act is not clear on this point, agencies will continue to argue against such coverage.

Therefore, the Center urges Congress to clarify its intention by conforming EAJA to other similar fee shifting statutes which provide for fees for work done in administrative proceedings necessarily engaged in as a requirement for the filing of a court action. Time and fees incurred litigating before an agency is an integral step in the process of vindicating rights and obligations and should be compensable. See e.g. 42 U.S.C. §2000C-5(K) (1964); (attorneys' fees provision enacted as part of the Civil Rights Act of 1964); 42 U.S.C. §1973(d)(1) (1975)(attorneys' fees provision enacted as part of the Voting Rights Act of 1975). Amending Section 2412(d)(1)(A) to require a court to grant an EAJA award for costs incurred by a party "in any civil action ... including agency administrative proceedings brought by or against the United States ...." is in the interest of the country in maintaining a balance.

CONCLUSION

The Equal Access to Justice Act embodies a particularly noble purpose; to ensure that public policy is created after all positions on an issue have been fully aired, rather than based on an imbalance of economic and legal resources.

The Act, however, has developed several technical impediments to achieving that goal. The Center's suggested reforms would bring the objective much closer.

20-902 O—83——13

266 NLRB No. 79

MJH

D--9769
Des Moines, IA

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

IOWA PARCEL SERVICE, INC. AND
IOWA EXPRESS DISTRIBUTION, INC.
AND WILLIAM K. WALKER, AN
INDIVIDUAL AND ALTER EGO

and

GENERAL TEAM AND TRUCK DRIVERS,
HELPERS AND WAREHOUSEMEN, LOCAL
UNION NO. 90, AFFILIATED WITH
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS OF
AMERICA

Case 18--CA--7146(E)

and

GENERAL DRIVERS & HELPERS UNION,
LOCAL NO. 554, AFFILIATED WITH
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS OF
AMERICA

Case 18--CA--7369(E)
(formerly 17--CA--10420)

DECISION AND ORDER

On October 28, 1982, Administrative Law Judge Michael O. Miller issued the attached Supplemental Decision in this proceeding. Thereafter, the Applicant, Iowa Express Distribution, Inc., filed exceptions and a supporting brief, and the General Counsel filed limited cross-exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Supplemental Decision in light of the exceptions and briefs and

has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

It is hereby ordered that the application of the Applicant, Iowa Express Distribution, Inc., Des Moines, Iowa, for an award under the Equal Access to Justice Act be, and it is hereby is, dismissed.

Dated, Washington, D.C. March 7, 1983

John C. Miller, Chairman

Howard Jenkins, Jr., Member

Robert P. Hunter, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

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[1] In affirming the Administrative Law Judge's dismissal of the "Application for Attorney's Fees and Expenses," we do not adopt his findings regarding the conduct or sufficiency of General Counsel's investigation in the underlying unfair labor practice proceeding.

JD-476-82
Des Moines, IA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

IOWA PARCEL SERVICE, INC. and
IOWA EXPRESS DISTRIBUTION, INC.

and

Case No. 18-CA-7146(E)

WILLIAM K. WALKER, An Individual
and Alter Ego

and

GENERAL TEAM AND TRUCK DRIVERS,
HELPERS AND WAREHOUSEMEN, LOCAL
UNION NO. 90, affiliated with
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA

and

Case No. 18-CA-7369(E)
(formerly 17-CA-10420)

GENERAL DRIVERS & HELPERS UNION,
LOCAL NO. 554, affiliated with
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA

SUPPLEMENTAL DECISION

/EQUAL ACCESS TO JUSTICE ACT/

On July 9, 1982, the National Labor Relations Board, herein called the Board, issued its Order in the above-entitled proceeding 1/ adopting the findings and conclusions of this Administrative Law Judge as contained in his Decision dated June 2, 1982 2/ and, inter alia, dismissing "that portion of the complaint alleging that Respondent Iowa Express Distribution, Inc. committed unfair labor practices . . . ." On July 23, 1982, Iowa Express Distribution, Inc., herein called the Applicant, timely filed an Application for Attorney Fees and Expenses under the Equal Access to Justice Act, herein called EAJA, 3/ and Section 102.143 of the Board's Rules and Regulations.

The Applicant asserts that it was a prevailing party in an adversary proceeding before the Board. It further asserts, and supports said assertions with appropriate affidavits and financial reports, that it is an Iowa corporation, engaged in the intrastate and interstate delivery of freight and commodities, employing less than 500 employees and having a net worth of less than $5,000,000. Attorneys fees and expenses totaling $26,686.95 4/ incurred in defending against the General Counsel's allegations, is sought.

On August 20, 1982, the General Counsel filed a Motion to Dismiss Application for an Award or Fees and Expenses under the Equal Access to Justice Act, contending that: (1) General Counsel's position in the litigation was substantially justified notwithstanding the ultimate dismissal of its allegations against Applicant; (2) Applicant is not entitled to

1/ Unpublished.
2/ JD-238-82.
3/ P.L. 96-481, 94 Stat. 2325.
4/ As amended by Applicant's Response to General Counsel's Motion to Dismiss.

expenses incurred prior to October 1, 1981, the effective date of EAJA; (3) Applicant is not entitled to expenses incurred prior to the issuance of complaint; (4) the application is deficient in that it contains no itemization of expenses incurred solely in connection with the unfair labor practice complaint proceeding; and, (5) Applicant is not entitled to expenses incurred in the preparation of its EAJA Application. Applicant filed a response to the Motion to Dismiss on September 8, 1982.

The Substantial Justification Question

Section 504(a)(1) of EAJA provides that an award shall be made to a prevailing party unless "the position of the agency as a party to the proceeding was substantially justified or . . . special circumstances make an award unjust." The burden of establishing substantial justification is on the government and the test of whether or not governmental action is substantially justified is one of reasonableness. The government, to defeat an award, must establish that its position had a reasonable basis in fact and law. However, the fact that the government lost its case does not give rise to any presumption that its position was unreasonable and the "substantially justified" standard does not "require the Government to establish that its decision to litigate was based on a substantial probability of prevailing." 5/ Moreover, as the Board has recently pointed out, the government's position might still be deemed reasonable in fact and law notwithstanding that General Counsel failed to establish a prima facie case. 6/

General Counsel's consolidated complaints alleged that Iowa Parcel Service, Inc. (herein called IPS), William K. Walker, and the Applicant, as alter egos and as a single employer, violated Section 8(a)(1), (3), and (5) of the Act by locking out and discharging the IPS employees in Des Moines, Iowa, closing the Des Moines facility and transferring some of the IPS operations to Applicant while failing and refusing to continue in effect the collective-bargaining agreement which existed between IPS and General Team and Truck Drivers, Helpers and Warehousemen, Local Union No. 90, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America . It further alleged that as alter egos and a single employer, these employers closed their Omaha, Nebraska facility, transferred the work of the employees of that facility to the Applicant, discharged the Omaha employees and failed and refused to recognize and bargain with General Driver & Helpers Union, Local No. 554, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, in violation of Sections 8(a)(1), (3), and (5) of the Act. IPS and Walker did not respond to the complaints' allegations. No answers were filed by them, no representative appeared on their behalf at the hearing held on January 11-14, 1982, and no defense was proffered. Based upon the uncontroverted allegations of the complaints and the record as developed by the General Counsel and the Applicant herein, I found that IPS and Walker had locked out the Des Moines and Omaha employees in violation of Section 8(a)(3), "permitted or encouraged the transfer of a portion of bargaining unit work to /the Applicant/ without notice to or bargaining with the Union" in violation of Section 8(a)(5), and further violated Section 8(a)(5) by completely abrogating its collective-bargaining agreement with Local 90. I recommended dismissal of the complaint allegations alleging that IPS had violated Section 8(a)(3) and Section 8(a)(5) by its discharge of employees on April 14, 1981, noting that the record had conclusively established that IPS and Walker had gone completely out of business on that date. 7/ I further found that the evidence, "while warranting grave suspicion," failed to establish that the Applicant was the alter ego of, or a single employer with, IPS and Walker and recommended that the complaints' allegations, insofar as they pertained to the Applicant, be dismissed. No exceptions to my Decision and recommended Order were filed and my findings, conclusions, and recommended Orders were adopted by the Board.

5/ S. Rep. No. 96-253, 96 Cong., 1st Sess. 6-7, 14-15 (1979); H.R. Rep. No. 96-1418, 96th Cong., 2nd Sess. 10-11 (1980); Spencer v. N.L.R.B., ___F.Supp.__, 111 LRRM 2065, 2066 (D.C., 1982)

6/ See Enerhaul, Inc., 263 NLRB No. 121 (1982).

7/ First National Maintenance Corporation v. N.L.R.B., 452 U.S. 666 (1981); Textile Workers Union of America v. Darlington Manufacturing Co., 380 U.S. 263 (1965).

In support of its contention that the General Counsel's allegations against it did not possess a reasonable basis in law and fact, the Applicant asserted, in its Application and in its Response to the General Counsel's Motion to Dismiss, the following: (1) General Counsel issued its complaint alleging that the Applicant was an alter ego of IPS and Walker within a week after the filing of amended charges naming, for the first time, the Applicant as a party respondent, without attempting to interview or obtain affidavits from Applicant's officers or agents in the investigation of those amended charges; (2) Applicant submitted a detailed statement of its factual and legal position to the General Counsel shortly after the issuance of the complaint in Case No. 18-CA-7146 and 7 months prior to the hearing herein, wherein it indicated its willingness to cooperate in any investigation of the charges; (3) no response to its offer of cooperation was made by the General Counsel; (4) General Counsel had in its possession or available to it public and other documents, including decisions of the Iowa Transportation Regulation Board and orders of that agency and the Interstate Commerce Commission, establishing the independence of Applicant from IPS and Walker; and, (5) the evidence possessed by the General Counsel and introduced at the hearing was insufficient, "as a matter of law," . . . to establish alter ego, single employer or disguised continuation status." In regard to the latter contention, the Applicant argues that the legal prerequisites to establish such status, particularly "substantially identical ownership, management, operations, facilities and equipment, customers and control of labor relations" are settled and well established in Board and Court decisions. General Counsel contends that the case it presented involved bona fide credibility issues warranting a hearing, including evidence from which I could have inferred that the Applicant "was created as a disguised continuance of IPS as part of an unlawful scheme," and presented "in good faith a close question of law or fact" which would bar the granting of an award. 8/

General Counsel did not dispute the Applicant's contention that it undertook no investigation wherein it sought to ascertain evidence or positions from the Applicant either before or after issuance of the complaint. Neither did General Counsel offer any explanation for its failure to conduct such an investigation. On the state of this record, then, I am compelled to accept the Applicant's contentions in this regard. While this failure to pursue all reasonable avenues of investigation prior to litigation is regrettable, contrary to the Board's Regulations (Sec. 101.4) and the instructions contained in the General Counsel's Case Handling Manual (Sec. 10056,4 and 10056.5) and certainly not to be condoned, I must conclude that the evidence which General Counsel had in its possession justified its issuance of the complaint against the Applicant as well as IPS and Walker and warranted ligitation. Thus, General Counsel had evidence of, and established, the following: the Applicant was formed by two high ranking and long term managerial employees of IPS, Sternberg and McElroy; Sternberg had been listed as a vice president of IPS in an IPS annual report to the Iowa Department of Transportation; Applicant's formation occurred while IPS was still in business, with Walker's blessings; Walker provided the initial financing for the Applicant with unsecured and initially undocumented no-interest loans; Walker had expressed an attitude toward his unionized employees from which one could conclude that he would have gone to almost any length to achieve his objectives in regard to them; the Applicant solicited certain of IPS' customers for their business, again while IPS was still in business and with Walker's knowledge and consent; the Applicant was engaged in an enterprise identical in type if not in scope to a portion of IPS' operations; the Applicant hired IPS' night supervisor, Clark, as its operations manager and Clark did the Applicant's hiring prior to the termination of IPS' business operations; the Applicant avoided hiring any of the former IPS employees; the Applicant contracted with IPS' insurance agent for coverage on its operations and there was some evidence from which it appeared that the Applicant initially operated under the IPS insurance policies; the Applicant began its business operations utilizing some equipment from the IPS operations; and, Walker, as well as Sternberg, McElroy and Clark, made statements to others indicating that the Applicant was Walker's company and a only device to hold on to certain pool shipment business until Walker was able to achieve his

8/ 126 Cong. Rec. H10226 (Daily Ed. October 1, 1980), the remarks of Rep. Neal Smith, Chairman of the Committee on Small Business.

objectives vis-a-vis the Unions. Additionally, General Counsel adduced evidence which, if credited, would have shown that Sternberg had encouraged and assisted Walker to acquire IPS and that McElroy had told the president of Local 90, long before the advent of the Applicant, that IPS had a plan to start another company. I found it unnecessary to resolve the question of Sternberg's alleged encouragement of Walker's acquisition of IPS and credited McElroy's denial of the latter statement attributed to him.

At the same time, General Counsel possessed or had available to it evidence establishing that while IPS was a multi-million dollar, multi-faceted trucking concern operating approximately 100 vehicles and serving approximately 4800 customers from substantial terminal facilities, the Applicant served only 5 customers with 4 vehicles and grossed only $200,000 in its first year of operation. Documentary evidence also established that the Applicant leased property in its own name and invested a substantial sum (for a company so small) in modifying those premises. Additionally, documentary evidence established that neither Sternberg nor McElroy possessed any financial interests in IPS and that Walker was neither an officer, agent or stockholder of the Applicant. The testimony revealed that neither Sternberg nor McElroy was related to Walker. The evidence, as submitted by the Applicant to General Counsel following issuance of complaint and as developed at hearing, established further that while Walker exercised virtual total managerial control over IPS, being involved in all decisions large and small, he exercised no such control over the operations or labor relations policies of the Applicant.

Based upon the foregoing facts, as more fully described in my intial decision, General Counsel argued in the case in chief that Walker had created the Applicant as a "disguised continuance of IPS created to hold the lucative pool distribution portion of the IPS operations until those operations were resumed." General Counsel sought a finding that McElroy and Sternberg did not independently form the Applicant but rather decided to continue it in operation after Walker elected to go out of business. General Counsel pointed, in particular, to the financing provided by Walker, the solicitation of the IPS' customers while IPS was still extant, the Applicant's use of IPS equipment, Walker's animus toward the Union, and the various statements by Walker, McElroy, and Sternberg which pointed toward a "disguised continuance." The Applicant argued that a finding of alter ego or single employer status was precluded by the absence of evidence of "common or substantially identical ownership, common management, common operations, common facilities, common customers, and common control of labor relations . . ."

As stated in my initial decision herein (slip. op. 16):

> To determine whether one legal entity is the alter ego of another, the Board looks to the ownership, management, business purpose, operation, equipment, customers and supervision of the two businesses. Where some of these listed indicia are 'substantially identical' the Board will find an alter ego status. However, not all of these standards have to be satisfied; centralized control of labor relations or identical corporate ownership is not crucial to the finding of an alter ego. Blake Construction Co., Inc., 245 NLRB 630, 634 (1979). See also Crawford Door Sales Co., Inc., 226 NLRB 1144 (1976). Identical corporate ownership is not the sine qua non of alter ego status; however, the presence of "substantially identical" ownership between the two enterprises is a prerequisite to a conclusion that such status exists. Mortons I.G.A. Foodliner, 240 NLRB 1246, fn. 2 (1979); Crawford Door Sales, supra. The term "disguised continuance" is another way of describing an alter ego and the legal requirements to establish the former are identical to those required to establish the latter. In Howard Johnson Co., v. The Detroit Joint Board, 417 U.S. 249, 259, fn. 5 (1974) the Supreme stated that alter ego or disguised continuance "cases involve a mere technical change in the structure or identity of the employing entity, frequently to avoid the effect of the labor laws, without any substantial change in its ownership or management." See also Marquis Printing Corporation, 213 NLRB 394 (1974).

I found, as previously stated, that the "facts here, while warranting grave suspicion, fail to establish alter ego status. The essential

element, a substantial identity of ownership, /is/ lacking." The interest free loan, I found, was not enough to establish the necessary ownership connection. The statements by Walker, McElroy, and Sternberg, I found, were probably made in an effort to conceal Walker's true intentions and to blame the Unions for the cessation of his businesses. I further found that there was no evidence of continued managerial control by Walker in the operations of the Applicant. 9/

Notwithstanding the ultimate rejection of the General Counsel's contentions, as briefly summarized above, I must conclude here that General Counsel presented, if not a prima facie case, a case which still had a substantial basis in fact and law. Thus, it was arguable, and I could have inferred, that Walker's financial support of the Applicant, in light of the statements made by the various participants, gave him continued actual control over the Applicant such as would establish alter ego status notwithstanding the absence of other evidence of "substantially identical" ownership. See Big Bear Supermarkets #3, 239 NLRB 179 (1978); Circle T Corporation, 238 NLRB 245 (1978); and, Ramos Ironworks, Inc., 234 NLRB 896 (1978), cited by the General Counsel in its brief in support of the case-in-chief. Those cases, I found, were distinguishable from the instant facts; they did provide, however, a substantial and legitimate basis upon which General Counsel was privileged to argue for a conclusion of alter ego status. See also American Pacific Concrete Pipe Company, Inc., 262 NLRB No. 139, slip. op. 11, (1982), cited by the General Counsel in its motion to dismiss the EAJA application. Therein, the Board found two employers who had "substantially identical business purpose, operations, equipment, and customers" to be alter egos notwithstanding that they "did not . . . share common ownership; nor, did they, on paper, share common management or supervision." Alter ego status was found in that case based upon actual control exercised by virtue of a lease agreement and involvement by the first employer in the second employer's labor relations. While that case, too, is factually distinguishable from the instant case, that case and the General Counsel's earlier cited cases establish that General Counsel presented an arguable case and advanced, in good faith, a "novel but credible extension and interpretation of the law." The General Counsel's position was, therefore, substantially justified. 10/

Accordingly, I must conclude that the General Counsel's complaint had a reasonable basis in fact and law, was substantially justified, and that an award of fees and expenses is not warranted. I therefore issue the following recommended:

ORDER

General Counsel's Motion to Dismiss Application is granted and the application of Iowa Express Distribution, Inc. for attorneys fees and expenses is dismissed. 11/

Dated: Washington, D.C. , October 28, 1982.

Michael O. Miller
Administrative Law Judge

9/ While my conclusions essentially concurred with those of the Iowa Transportation Regulation Board, they were independently arrived at. The findings and conclusions of such an agency, while admissible before the Board, are not entitled to conclusive weight by either the General Counsel or the Board. See Magic Pan, Inc., 242 NLRB 840 (1979).

10/ See S. Rep. 96-253, 96 Cong. 1st Sess., 7; H. Rep. 96-1418, 96 Cong. 2nd Sess., 11.

11/ In view of my disposition of the substantial justification issue, I deemed it unnecessary to reach the additional defenses and arguments raised by the General Counsel in opposition to the application. See Spencer v. NLRB, supra. Supp.

Senator GRASSLEY. In closing I would like thank all our witnesses for appearing today. Much needed information on this Equal Access to Justice Act has been obtained, and you can be assured that the subcommittee will carefully examine all testimony as we go about the process of reauthorization.

As I indicated from the outset, S. 919 is a vehicle for discussion. I want to emphasize that because all aspects of it are open for consideration. I think we can all agree that certain changes and clarifications are necessary in order to accomplish the intended goals of equal access.

I wish to say that the record will remain open for 7 days to receive further testimony. In addition, any of the people who testified may receive written questions from other subcommittee members who could not be here today and we would appreciate your responses in writing to those.

I am aiming for markup toward the end of April or the first part of May at the subcommittee level so that we can get this to the full committee shortly thereafter.

Thank you all. The hearing is adjourned.

[Whereupon, at 4:30 p.m., the subcommittee was adjourned.]

APPENDIX

ADDITIONAL STATEMENT FOR THE RECORD

REPORT BY THE DIRECTOR

OF THE

ADMINISTRATIVE OFFICE

OF THE

UNITED STATES COURTS

William E. Foley
Director

Report by the Director on Requests for Fees and Expenses Under the Equal Access to Justice Act of 1980

The Equal Access to Justice Act

The Equal Access to Justice Act, Title II of P.L. 96-481, 94 STAT 2325, lessens the financial burden on private parties who prevail against the U.S. in agency adversary adjudications or non-tort civil actions by authorizing the award of attorney fees and expert witness fees. The Act also covers outlays for any study, analysis, engineering report, test, or project necessary in building a case. To be eligible for such an award, the party must prevail and meet certain financial requirements of the statute. However, even when the private party prevails against the U.S. and is determined to be financially eligible, the attorney fees and other expenses requested can be denied if the U.S. can demonstrate that its position was "substantially justified." Petitions for fees may also be denied if the court finds that the private litigant used delaying tactics or if special circumstances exist which would make an award unjust.

Reporting Requirement

The Act, under Title 28 U.S.C. Section 2412(d)(5), requires the Director of the A.O. to include in his Annual Report the amount of fees and other expenses awarded by the Federal courts under Title 28 U.S.C. Section 2412(d) during the preceding fiscal year. The Annual Report, however, is prepared for the year ended June 30, not the fiscal year. Therefore, this first report covers the period from the effective date of the Act, October 1, 1981 through June 30, 1982. Future reports will provide data for an entire year (July 1 through June 30).

Analysis and Summary of Data

As summarized in Table XX, there were 30 petitions for attorney fees and other expenses disposed of under the Equal Access to Justice Act in the Federal courts. There were 24 petitions (80.0 percent) filed in the U.S. district courts. One petition was in the U.S. Court of Claims, four in the U.S. courts of appeals, and one in a U.S. bankruptcy court. The U.S. Supreme Court remanded one case for the purpose of considering an award of attorney fees under the Equal Access to Justice Act. This case is currently pending in district court.

The Internal Revenue Service was the agency involved most frequently in equal access decisions with eight petitions. Six petitions were filed against the Department of Health and Human Services, six against the Department of the Interior, and two against the Department of Labor. Eight other agencies were each involved in one equal access decision.

Of the 30 petitions filed, and closed, 27 were original petitions made under Title 28 U.S.C. Section 2412(d)(1)(A) after judgment in a civil case against the U.S. Two were original petitions under Title 28 U.S.C. Section 2412(d)(3), after the court reviewed an agency decision on the merits of the case and ruled for the private party, and one was an appeal of an attorney fee determination made by a lower court. This particular case originally involved a denial of attorney's fees under the Civil Rights Attorney Fees Award Act (Title 42 U.S.C. Section 1988), however, the Equal Access to Justice Act amended this statute. Therefore, as of October 1, 1981, this case fell under the coverage of the Equal Access to Justice Act and an award was eventually made by the court of appeals.

Seventeen (56.7 percent) of the 30 requests for attorney fees and other expenses were denied. Fourteen were denied because the court decided the U.S. position was "substantially justified." The Federal agencies involved in these cases were able to demonstrate that their positions were reasonable in law and in fact. The other three petitions were denied because special circumstances existed which would make an award unjust. In one case, the court ruled that its lengthy delay in reaching a decision made an award of attorney fees unfair. If it had acted in a timely manner, the court stated, the case would not have been pending on October 1, 1981 and, therefore, would not have been eligible for an award under the Equal Access to Justice Act. In another case, the court defined the words "incurred fees and expenses" to exclude an award of attorney fees because the petitioner was not obligated to pay his public interest attorneys. In the third case, the court found the prevailing party was not entitled to attorney fees and other expenses because the government was not allowed adequate opportunity to correct its mistake before the suit was filed.

Cases where fee requests under the Equal Access to Justice Act were denied because the petitioner was determined not to be the prevailing party and cases where the petitioner should have filed for an award under another fee-shifting statute are not included in this re-

port. Petitions where the 30 day statutory deadline for filing for attorney fees and other expenses had expired are also excluded.

Federal courts granted 13 petitions for attorney fees and other expenses, awarding a total of $683,518. This includes two cases where the request for attorney fees was denied and only the request for filing and service fees was awarded.

Of the $683,518 awarded, $676,692 or 99.0 percent was for attorney fees. Other expenses, such as filing and service fees, transportation costs, and telephone expenses accounted for the balance ($6,826). On the average, successful petitioners received 89.4 percent of the total amount of fees and expenses requested.

The largest award was $435,999 in attorney fees and other expenses in one petition involving the Department of Health and Human Services, the Department of Education, the Federal Communications Commission, and the Department of Justice. In another case, the court awarded $200,000 in attorney fees against the Department of Defense. These two cases accounted for 93.0 percent of the total amount awarded. Six awards totalling $21,568 were granted against the Internal Revenue Service. Three additional awards adding to $7,120 were allowed against the Department of Health and Human Services. One award of $12,930 was granted against the Department of Labor and one of $5,901 was granted against the Government Printing Office.

Table XX
Decisions on Applications for Equal Access to Justice Act Awards
By Type of Court and Agency - October 1, 1981 through June 30, 1982

Court/Agency	Petitions	Petitions Denied		Petitions Granted			Nature and Amount of Awards[1]			
		Number	Total Fees and Expenses Claimed	Number	Total Fees and Expenses Claimed	Total Amount Awarded	A	B	C	D
Total	30	17	$217,133	13[2]	$764,446	$683,518	$676,692	-	-	$6,826
U.S. Court of Claims										
Dept. of the Treasury	1	1	19,291	-	-	-	-	-	-	-
U.S. Courts of Appeals										
Dept. of Labor	2	1	51,479	1	12,930	12,930	12,930	-	-	-
Internal Revenue Service	1	1	22,917	-	-	-	-	-	-	-
Occupational Safety and Health Review Comm.	1	1	4,610	-	-	-	-	-	-	-
U.S. District Courts										
Army Corps of Engineers	1	1	20,829	-	-	-	-	-	-	-
Dept. of Agriculture	1	1	[3]	-	-	-	-	-	-	-
Dept. of Defense	1	-	-	1	200,000	200,000	200,000	-	-	-
Dept. of Health and Human Services	6	2	12,745	4[4]	514,285	443,119	438,446	-	-	4,673
Dept. of Housing and Urban Development	1	1	20,550	-	-	-	-	-	-	-
Dept. of the Interior	6	6	46,860	-	-	-	-	-	-	-
Dept. of Justice	1	1	25,053	-	-	-	-	-	-	-
Gov't. Printing Office	1	-	-	1	10,832	5,901	5,710	-	-	191
Internal Revenue Service	6	1	1,699	5[2]	25,968	21,137	19,235	-	-	1,902
U.S. Bankruptcy Courts										
Internal Revenue Service	1	-	-	1	431	431	371	-	-	60

[1] A = Attorney Fees
B = Study, Analysis, Engineering Report, Test or Project
C = Expert Witness Fees
D = Other, including filing and service fees, telephone expenses, and transportation costs.

[2] Includes two cases where the request for attorney fees was denied and only the request for filing and service fees was granted.

[3] Petitioner did not specify an amount in his request for attorney fees.

[4] Includes one case where $435,999 in attorney fees and other expenses was awarded against the Department of Health and Human Services, the Federal Communications Commission, the Department of Education, and the Department of Justice.

Decisions on Applications for Equal Access to Justice Act Awards
By Type of Court and Agency - July 1, 1982 through March 31, 1983[1]

Court/Agency	Petitions	Petitions Denied		Petitions Granted			Nature and Amount of Awards[2]			
		Number	Total Fees and Expenses Claimed	Number	Total Fees and Expenses Claimed	Total Amount Awarded	A	B	C	D
Total	27	18	$498,150	9	$501,664	$141,171	$129,595	$598	$6,379	$4,599
U.S. Court of International Trade										
Dept. of the Treasury	1	1	12,748	-	-	-	-	-	-	-
U.S. Claims Court										
Agency for International Development	1	-	-	1	230,234	12,110	11,362	-	-	748
Dept. of the Air Force	2	2	16,067	-	-	-	-	-	-	-
Dept. of the Army	1	1	5,264	-	-	-	-	-	-	-
Dept of the Navy	1	1	22,552	-	-	-	-	-	-	-
Dept. of the Treasury	1	1	52,738	-	-	-	-	-	-	-
General Services Administration	1	1	21,769	-	-	-	-	-	-	-
Internal Revenue Service	2	2	11,897	-	-	-	-	-	-	-
Renegotiation Board	1	-	-	1	96,259	43,780	36,291	-	4,625	2,864
U.S. Courts of Appeals										
Dept. of Health and Human Services	1	1	5,289	-	-	-	-	-	-	-
National Labor Relations Board	2	2	36,813	-	-	-	-	-	-	-
U.S. District Courts										
Dept. of Agriculture	2	2	279,265	-	-	-	-	-	-	-
Dept. of Health and Human Services	5	2	4,423	3	18,581	12,061	9,069	598	1,754	640
Dept. of the Interior	1	1	17,681	-	-	-	-	-	-	-
Dept. of Justice	2	-	-	2	120,832	38,087	37,740	-	-	347
Dept. of Labor	1	-	-	1	21,533	20,908	20,908	-	-	-
Federal Bureau of Investigation	1	-	-	1	14,225	14,225	14,225	-	-	-
Internal Revenue Service	1	1	11,844	-	-	-	-	-	-	-

[1] Based on reports received as of May 2, 1983.

[2] A = Attorney Fees
B = Study, Analysis, Engineering Report, Test or Project
C = Expert Witness Fees
D = Other, including filing and service fees, telephone expenses, and transportation costs.

Prepared by: Statistical Analysis and Reports Division
Administrative Office of the United States Courts
May 2, 1983

Applications for Equal Access to Justice Awards
July 1, 1982 through March 31, 1983*

A.O. Number	U. S. Court	Docket Number	Parties Involved	Total Amount Awarded	Date Request Awarded or Denied
1.	International Trade	82-4-00582	Bar-Mar Warehouse Co. and TREA	$ -	09-23-82
2.	Claims Court	73-478	Kay Manufacturing Co. and Renegotiation Board	43,780	10-06-82
3.	Claims Court	81-339	ACS Construction Co. and ARMY	-	10-08-82
4.	Claims Court	81-737	Grace Baptist Church and IRS	-	10-13-82
5.	Claims Court	78-261	Ellis and NAVY	-	11-02-82
6.	Claims Court	79-56	Change-All Souls Housing Corp. and IRS	-	12-09-82
7.	Claims Court	80-230	Bailey and DOAF	-	01-13-83
8.	Claims Court	78-243	Hock and TREA	-	02-24-83
9.	Claims Court	77-519	Engels and DOAF	-	03-29-83
10.	Claims Court	80-508	Morris Mechanical Enterprises and GSA	-	03-03-83
11.	Claims Court	76-235	McCarthy and AID	13,110	03-18-83
12.	Fourth Circuit Court of Appeals	81-1847	Tyler Business Services and and NLRB	-	11-24-82
13.	Fourth Circuit	82-1090	Mitchell and HHS	-	03-24-83
14.	Fifth Circuit	81-4411	Scooba Manufacturing Co. and NLRB	-	03-21-83
15.	D.C. District Court	82-2315	NAACP and LABR	20,908	12-14-82
16.	New York, Southern	80-2179	Hoffman and HHS	-	01-28-83
17.	New York, Southern	81-3511	Gorman and HHS	2,194	02-03-83
18.	New York, Southern	79-6167	Correa and HHS	1,938	03-10-83
19.	New York, Southern	82-3121	Hunt and AGRI	-	03-21-83
20.	New York, Southern	81-7190	Boudin and DOJ	37,740	03-23-83
21.	Vermont	81-0217	Bain and HHS	-	11-02-82
22.	Illinois, Northern	79-3812	Allen and IRS	-	07-06-82
23.	Alaska	81-264	Trustees for Alaska and DOI	-	02-08-83
24.	Alaska	81-12	Sierra Club Legal Defense Fund and AGRI	-	02-23-83
25.	Arizona	81-0705	Devereux and FBI	14,225	11-15-82
26.	Arizona	82-0867	Wieser and DOJ	347	11-30-82
27.	Idaho	78-1223	Wolverton and HHS	7,929	08-27-82

*Based on reports received as of May 2, 1983.

Prepared by: Statistical Analysis and Reports Division
Administrative Office of the United States Courts
May 2, 1983